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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

FREDERIC K. CONOVER,
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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Until January 1, 1894.

WILLIAM P. LYON,
Ex officio CHIEF JUSTICE.
HARLOW S. ORTON,
JOHN B. CASSODAY,
JOHN B. WINSLOW,
SILAS U. PINNEY.

After January 1, 1894.

HARLOW S. ORTON,
Ex officio CHIEF JUSTICE.
JOHN B. CASSODAY,
JOHN B. WINSLOW,
SILAS U. PINNEY,
ALFRED W. NEWMAN.

Attorney General, - JAMES L. O'CONNOR.

Clerk, - - - CLARENCE KELLOGG.

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MEMORANDUM.

This volume includes all cases determined prior to the January term, 1894, and a few cases decided at that term. Contrary to the usual rule, the case of *Weld v. Johnson Mfg. Co.* (p. 552), in which a rehearing was denied March 16, 1894, is reported with the cases of December 29, 1893 (the day on which the decision was first announced), in order that it may appear in connection with the other case between the same parties (p. 549) decided at that time.

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PRESENTATION PROCEEDINGS.

PORTRAIT OF JUDGE COLE.

On the 29th of December, 1893, Charles E. Dyer addressed the court as follows:

May it please the Court.—In presenting to this court, on another occasion, the portrait of one who held the position of a judge of the supreme court under its first organization, a gentleman of the bar, now a member of this court, remarked that to the lawyer who visits the Inns of Court in London, there are no objects within those venerable walls so interesting and inspiring as the portraits, busts, and statues of the great lawyers and illustrious judges whose grave and kindly faces look down upon him in those homes and cradles of the common law. And he indulged the hope that the time was not distant when the walls of this court room would be graced and adorned with like memorials of those who, in their day and generation, faithfully served the state in the administration of justice. [See 80 Wis. xlvi. REP.]

Hearty concurrence in the sentiment thus expressed, and the recollection of the long and eminent service of Judge ORSAMUS COLE as a member of this court, joined with the high personal regard in which he has been always held by his brethren of the bar, and which has steadfastly followed him in his retirement, have prompted the preparation of the portrait, which I am sure it gives your Honors pleasure to see before you. In behalf of all the personal friends of Judge COLE, I respectfully ask its acceptance by the court, and that it may have its appropriate place here, in this seat of justice with which his *actual presence* was so long associated.

His connection with this high court of judicature, extending through a period of nearly thirty-seven years, entitles him to this recognition. Public position is to be valued in precise proportion to the fidelity with which its duties are performed. The value to the state, of the public life of Judge COLE, must be estimated in accordance with that principle, and so estimating it, his service has been invaluable. The political world, oftentimes with turbulent demonstration and even unseemly flattery, bestows its honors upon its living idols and heroes. Why should not

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those whose lives have been laboriously spent in the retiracy of judicial vocation, fashioning and building the jurisprudence of a commonwealth, be also kindly remembered, and their achievements suitably recognized, while they are still with us and of us and may yet enjoy the pleasures of happy retrospect and the realization of the public gratitude.

The work of the Bench is growing to be more and more valued and its power more and more felt. A preacher of distinction, whose thoughts keep pace with modern progress, says the Bench of the current times seems as pure as the closet of literature. Further, he says, it is the happiness of the bar to congratulate the times over the fact that the judges in the higher courts draw their decisions from the law and the evidence; "and that whereas one age was happy in the possession of one honest judge,— MATTHEW HALE,— our country is happy in the possession of many such administrators of justice. More and more have educated men in literature and in the professions sought to combine with their mental gifts and their position the fame of integrity."

Every lover of his country must rejoice that this is so; for "the fame of integrity" endures, when, without it, brilliancy of intellect perishes with the decay of its possessor.

The public career of Judge COLE forms a large part of the judicial history of the state, and has secured to him the true fame of which I have spoken. He has been associated with all the members of this court in unbroken succession, from June, 1855, when EDWARD V. WHITON was Chief Justice, to the time when he left the Bench, himself Chief Justice, January 4th, 1892. His judgments may be read in every volume of the Wisconsin Reports from the 4th to the 81st volumes, both inclusive. The value of his contributions to the jurisprudence of the state is in equal proportion to the extent of his work.

He had not been long on the bench when it devolved upon him to deliver judgment, in concurrence with that of his associates, in a cause which had for its advocates on one side or the other such lawyers as Jonathan E. Arnold, Edward G. Ryan, his Honor Mr. Justice ORTON, Matthew H. Carpenter, Timothy O. Howe, and James H. Knowlton. I refer to the celebrated case of *Bashford vs. Barstow.*

Then coming down to the period of the civil war, in the case of *Griner,* reported in 16th Wis. Rep., Judge COLE delivered the judgment of the court — and it is most instructive and exhaustive — sustaining the power of the President to call out the militia to execute the laws of the Union, and his authority for that purpose to draft and call into the field the quota of militia assigned to the state. And in the same volume is reported his opinion with those of two other eminent judges, DIXON and PAINE, in the case of *Kemp,* wherein it was adjudged that the proclamation of the President suspending the privilege of the writ of *habeas cor-*

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pus, was not a legal and valid exercise of executive power, under the constitution and laws.

In *Jones vs. The Estate of Keep*, reported in 19th Wis., Judge COLE delivered the judgment of the court that the provision of the act of Congress of 1862, which required stamps to be affixed to "writs or other original process by which any suit is commenced in a court of record," was unconstitutional and void, holding that such writs or other processes were essential means by which the state governments exercised their functions, and therefore exempt from taxation.

Other causes involving important public questions in which Judge COLE promulgated the law, such as *Delaplaine's Case* reported in 42d Wis., which presented the great subject of riparian rights, might be alluded to, but with all of them the courts and the bar are familiar.

Human ambition may well cease its struggle, and intellectual effort may well exchange activity for repose, when both have been crowned with a life work so useful and complete. To nobly and honorably connect one's name with the jurisprudence of a nation or a state, is to achieve that character of fame which no changes of time or circumstance can efface. The work of the artist's brush or the sculptor's chisel, highly wrought and finished as it may be, may perish in the scourge of the destroying elements, and be lost even to memory. But though the memorial, whether in portrait or statue, become extinct, the fruits of the learning and research and toil of the subject of that memorial remain in their richness and excellence, and are imperishable.

Generations may come and go, but the judge on the bench and the lawyer at the bar will continue to appeal for support and justification to the jurists who have stamped their judgments with the character of commanding authority. For they are such as have lived

"To clutch the golden keys,
To mould a mighty state's decrees."

Thirty-seven years measures the period of many a professional lifetime. It has been the happy fortune of the judge whose service on the bench of this court we commemorate, to have faithfully and honorably discharged the functions of his high office for nearly that whole period. We of the bar take just pride in such a record of judicial achievement. But the testimony to the worth and value of the work of Judge COLE is not limited to such as springs merely from local regard and pride. He has achieved honorable place among the jurists of the land. He was a pure judge, an upright judge, a just judge. He mastered the facts and enunciated the law. Patient, thoughtful, laborious, kind, attentive, and true to every dictate of conscience and sense of duty, he stands as a model for judge and lawyer to copy.

And now, when the bells are pealing afar and near, reminding us that

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the old year is going and the new year is coming, when the festal cheer of the season awakens with renewed activity the spirit of genial fellowship, we may suitably extend to the friend whose portrait is left in the kindly keeping of the court, our wishes that he may long continue to enjoy, in unabated health and vigor, the felicity of happy reflections upon duty nobly performed.

On behalf of the court, Mr. Chief Justice LYON responded as follows:

Judge Dyer: My brethren have placed me under a great obligation by awarding me the privilege of expressing to you our united thanks for your generous donation of the portrait of Judge ORSAMUS COLE, late the Chief Justice of this court. It has been placed and will remain with the portraits which adorn these walls of several former justices of the court with whom he served. The artist has happily succeeded in catching and perpetuating upon the canvas the calm, benignant expression of face and feature which beamed upon more than a generation of lawyers who practiced in this court while he was one of its members,— an expression which never darkened and which always inspires respect and affection.

My brethren also especially desire that you be assured of our united appreciation of your timely and most eloquent remarks on this occasion, in which, in fitting terms, you have rendered just tribute to the fidelity and usefulness during his long judicial career, as well as to the great ability, of our friend and former official associate. And, better than all else, what you have said of the loveliness of his character finds a cordial response in each of our hearts.

Judge COLE is the last of the elected Chief Justices of this court. This portrait will occupy the panel reserved for it with the portraits of the other Chief Justices by election,— WHITON, DIXON, and RYAN,— together with that of Chief Justice DUNN of the territorial Supreme Court. All these were able jurists and were prominent and useful in laying the foundations of our jurisprudence in broad and enduring principles. The fame of some of them is national. It is no disparagement to the memory of the others to say that in symmetry of character, in untiring, well-directed industry, in strength and accuracy of judgment, in love of justice, in obedience to the law, in unswerving fidelity to duty, Chief Justice COLE is the peer of any of them. We pay honor to the memory of either of those great Chief Justices when we say of him that he was the peer of Chief Justice COLE. For more than thirty-six years he was an honored member of this court, and during that time took part in the adjudication of thousands of causes. Many of them involved questions of vast importance to the state — some were of national concern — and

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all of them affected rights of person, reputation, or property. Their determination required careful study and wise discrimination, so that the law should be correctly stated and applied. In the discharge of these high duties Judge COLE patiently listened to argument and the views of his brethren, carefully weighed the same and investigated for himself, and, when convinced, gave judgment, and gave it in obedience to the law and in the fear of God. He feared none else. Such a man can never be moved by applause or censure, no matter from whence it comes.

During the last few years of Judge COLE'S service here, the business of the court was conducted almost entirely by lawyers who were admitted to practice in this state after he became one of its members. It is a great satisfaction to know that in what we are saying on this occasion we voice the unanimous sentiment of all who ever practiced before him, as well as of all the people of our state who have had opportunity to know his services and worth.

The record of Judge COLE'S judicial life, and the evidences of his great ability, are contained in seventy-eight volumes of the Wisconsin Reports — from Volume 4 to Volume 81 inclusive — in which are reported the opinions and judgments of the court in about eight thousand causes. Besides those in which he wrote the opinions, nearly all the others passed the scrutiny of his conscientious investigations both of fact and law,— a record of judicial labor which has seldom been surpassed. I should do violence to my feelings were I to abstain from reproducing here what you said of Chief Justice COLE when, two years ago this day, exercises were had in this place in memory of Chief Justice DIXON, then lately deceased, on which occasion you were one of the speakers. These were your words: "For more than thirty-six years he has sat upon this bench, administering justice to his fellow-men in a spirit and with a devotion perfectly consonant with his pure and stainless life. A record without a blemish! A name imperishably associated with the judicial annals of the commonwealth! Having been in earlier years the contemporary and associate of WHITON, SMITH, DIXON, PAINE, and DOWNER, and thenceforward of RYAN and TAYLOR and the present members of this court, his memory covers a period of judicial history replete with interesting retrospect and reminiscence. Happy logic of events it was, that crowned such a career with the chief justiceship of a court which is the pride and glory of the state. With head whitened in the public service, he shall carry with him in his retirement not alone the reverent respect and high esteem of his brethren of the bench and bar, but he shall go laden with the spontaneous tributes of their affection and with their earnest wishes that many years of health and happiness may yet be his lot and portion."

It is not my purpose to speak at length of the character and services

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of Judge COLE. You have done this far better than I possibly could do it, and your eloquent words will find response in thousands of hearts. We are glad that you have been moved to give them utterance. We rejoice that his life is spared, that good health is vouchsafed him, and that in his retirement he enjoys the peace and happiness which is the reward of a useful and well-spent life. We earnestly pray that he may long be spared to gladden with his presence the hearts of those who love him.

These proceedings, including the remarks made on the occasion, will be spread on the journal of the court and published in its reports.

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CASES DETERMINED

AT THE

August Term, 1893.

HURD, Respondent, vs. DOTY, Appellant.

September 6 — September 26, 1893.

Life insurance: Insurable interest: Agreement to receive insurance money in trust: Enforcement: Illegality.

A cousin of plaintiff's wife, who lived much of the time in plaintiff's family, procured insurance upon her own life, payable in part to him. Afterwards a question arose as to whether plaintiff, not being a blood relation, could be named as a beneficiary, and it was agreed between the assured, plaintiff, and defendant (an aunt of the assured) that defendant should be named as beneficiary but should receive the insurance moneys in trust and pay a part thereof to plaintiff. Plaintiff thereupon surrendered the insurance certificate, which had been delivered to him, and a new certificate was procured according to the agreement. After the death of the assured the insurance moneys were paid to defendant, but she refused to pay any part thereof to plaintiff. *Held*, that whether plaintiff had an insurable interest in the life of the assured or not, defendant was bound to pay over to him the money according to the agreement.

APPEAL from the Circuit Court for *Dane* County.

On January 27, 1885, one Fannie E. Nash received from the Northwestern Mutual Relief Association of Madison a certificate of membership for insurance in an amount not exceeding $4,000, with one half payable to E. E. Doty, and the remainder equally divided between the plaintiff and C. C. Chittenden as beneficiaries. On March 29, 1889, the

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said Fannie E. signed an application for change of beneficiary in said insurance, so as to make $2,000 thereof payable to the plaintiff, and the balance thereof to be equally divided between E. E. Doty and C. C. Chittenden, and therein and thereby returned and surrendered said former certificate of insurance. Thereupon, and on July 19, 1890, the said company issued to said Fannie E. a new certificate for insurance, not exceeding $4,000, of which sum $2,000 was payable to the plaintiff, and the remainder to be equally divided between E. E. Doty and C. C. Chittenden, and they to pay all her just debts and expenses of last sickness and funeral. The plaintiff held said certificate for said Fannie E. until it was surrendered as hereinafter mentioned. Said Fannie E. was a cousin by birth of the plaintiff's wife, and a second cousin of his son. She was an inmate of the plaintiff's family, and had a home there for some time during the latter years of her life.

On November 19, 1891, at the home of the defendant, the said Fannie E. and the plaintiff met the defendant, and the question arose between them whether said plaintiff and the said E. E. Doty, who is the husband of the defendant, not being blood relations of the said Fannie E., were entitled to be named as beneficiaries in the said policy; and thereupon, and in order to carry out the wishes of the said Fannie E., it was then and there mutually agreed by and between this plaintiff and the defendant and the said Fannie E. that the benefit certificate in the nature of a life insurance policy then existing in said company should be changed, and that C. C. Chittenden should be a beneficiary in such certificate for $100 only, and that the defendant, *Amanda M. Doty*, who was an aunt and blood relation of the said Fannie E., should be named as beneficiary for the remainder of $4,000, namely, for the sum of $3,900, but on the trust, promise, and agreement of said defendant that she would accept said trust and accept the fund so to

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come to her as such beneficiary, and from and out of the same at once hand over and deliver to the plaintiff the sum of $1,950, which the said Fannie E. then and there determined and directed should be paid to the plaintiff. During said negotiations the said Fannie E. proposed that the plaintiff's wife should be named in said certificate as beneficiary, but in trust, in fact, for the said sum of $1,950, which the said Fannie E. then and there determined and fixed upon as the amount to be paid to the plaintiff of said insurance money; but the defendant interfered and urged the said Fannie E. to have the certificate made to her as beneficiary for the said sum of $3,900, at the same time assuring the said Fannie E. that she could safely trust her (the defendant) to perform the trust and pay over to the plaintiff the sum of $1,950 to be received on said certificate; and said Fannie E. and the plaintiff relied on said assurance and agreement of said defendant, and were thereby led to dismiss the suggestion of having the wife of the plaintiff or some other person named as beneficiary in behalf of the plaintiff for said sum of $1,950.

Up to that time, November 19, 1891, the plaintiff had possession of the then outstanding policy of insurance, and at the request of the said Fannie E. was holding the same for safe-keeping. Relying upon the promise and agreement of the said defendant, and confiding therein, and in pursuance of the said agreement, he thereupon delivered the said policy or certificate of insurance to the said company, and the secretary of the said company thereupon made out a blank application for a change of beneficiary, wherein the outstanding certificate was surrendered and the said association directed to issue and forward to the said Fannie E. a new certificate for the same amount of insurance, in which $1,950 should be payable to this plaintiff, and $100 to said C. C. Chittenden, and the balance to the said E. E. Doty, who was therein to pay all her just

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debts and all her funeral expenses. Upon the back of such filled-up blank application the said Fannie E. made and signed the following instrument or writing, to wit: "Burke, Wis., Nov. 24, 1891. Mr. Parkinson [the secretary of the company]: I think this should be changed to read just a little different, like this: *R. W. Hurd*, $1,950, and he to pay all expenses to present date; C. C. Chittenden, $100; E. E. Doty, the remaining $1,950, and expenses from this date. Please make this change and oblige FANNIE E. NASH." Thereupon the manager of such company wrote a letter to the said Fannie E., bearing date November 24, 1891, saying in effect: "Your note to Mr. Parkinson relative to the change in the wording of your application for a change of beneficiaries, has been referred to me. Replying, I have to say that the statutes under which the association is incorporated declare that its object is to provide for the families of its members and their kindred. 'Kindred,' as we understand it, means 'blood relation.' We had supposed that the beneficiaries named in your certificate were in accordance with our rules and the statutes of the state; but I have to-day, for the first time, learned that *R. W. Hurd* does not sustain a relationship to you that would entitle him to be one of your beneficiaries. You will therefore please name such persons for beneficiaries as will be legally entitled to claim insurance in the event of your death, in compliance with the law above quoted in this regard, and oblige." "P. S. The same objection made to *R. W. Hurd* applies to E. E. Doty, but in the case of the latter you can substitute your aunt, Mrs. Doty, as beneficiary." To that letter the said Fannie E. replied, under date of November 25, 1891, to the effect: "Please make out new policy at once leaving C. C. Chittenden $100, and *Mrs. A. M. Doty* [defendant] the remaining $3,900, and oblige."

On the same day the said Fannie wrote to the plaintiff a letter in these words: "Uncle was in town yesterday and

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took the policy [application] you sent out to Mr. Briggs. That worthy objects. Uncle [the defendant's husband] will show you his letter to me, so I have it all made out to aunty [the defendant] but the $100 to C. C. C., *but she agrees to make it all right, as agreed upon between you the other night.* Have not been as well the last two or three days. Come out on the train and see me. You see by the old policy you would have lost it all. Please let uncle [the defendant's husband] take the old policy, so as to have this finished up."

On November 25, 1891, the said Fannie E. signed a blank application for change of beneficiary, filled out by the secretary of the company, whereby she requested the company to "issue and forward to me a new certificate, payable to my relative C. C. Chittenden, $100, and to my aunt *Mrs. Amanda M. Doty* the sum of $3,900;" whereupon, and on the same day, the company, by its president and secretary, made a new certificate of insurance for not to exceed $4,000, of which $100 was payable to her "relative C. C. Chittenden," and $3,900 to "her aunt *Mrs. Amanda M. Doty.*"

The said Fannie E. Nash died December 17, 1891, in Dane county. Thereupon, and on May 21, 1892, at Madison, the said company paid said $100 to said Chittenden, and $3,900 thereof to the said defendant. The plaintiff thereupon duly demanded of the defendant that she should deliver to the plaintiff the said $1,950 so received and held by her in trust for him, but she refused to pay over or deliver to him the same or any part thereof, and denied said trust.

On October 7, 1892, the plaintiff served and filed this bill in equity to have the defendant declared and adjudged a trustee, holding said sum of $1,950 so received by her in trust for the plaintiff. To that complaint, defendant put in an answer taking issue with the allegations of the com-

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plaint, and upon the trial the court found the facts in effect as stated, and also found, as conclusions of law, that the defendant holds said $1,950 in trust for the plaintiff, and that said agreement and trust were valid and binding upon the defendant; that her neglect and refusal to pay over to the plaintiff said sum of $1,950 was wrongful and in fraud of the plaintiff and the trust under which the defendant received that fund; that the plaintiff was entitled to judgment herein, and to recover of and from the defendant the sum of $1,950, together with interest since the same was received by her, to wit, May 21, 1892, in the sum of $91, together with costs herein to be taxed. From the judgment entered accordingly the defendant appeals.

For the appellant there was a brief by *Lewis & Briggs* and *John D. Gurnee*, and oral argument by *H. M. Lewis*. They contended, *inter alia*, that plaintiff had no insurable interest in the life of Fannie E. Nash. 2 May, Ins. (3d ed.), sec. 590; *Ruse v. Mut. Ben. L. Ins. Co.* 23 N. Y. 516; Angell, Ins. sec. 296; 2 Parke, Ins. (7th ed.), 639; Bacon, Ben. Soc. sec. 250; *Lewis v. Phœnix M. L. Ins. Co.* 39 Conn. 100; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Elsey v. Relief Asso.* 142 Mass. 224; *Continental L. Ins. Co. v. Volger*, 89 Ind. 572; *Singleton v. St. Louis Mut. L. Ins. Co.* 66 Mo. 63; *Appeal of Corson*, 113 Pa. St. 438; *Gilbert v. Moose's Adm'r*, 104 id. 74; *Rombach v. Piedmont Ins. Co.* 35 La. Ann. 233; *Mich. Mut. Ben. Asso. v. Rolfe*, 76 Mich. 146; *Silvers v. Mich. Mut. Ben. Asso.* 94 id. 39. Plaintiff could not be a beneficiary in a certificate issued by the Northwestern Mutual Relief Association, organized under sec. 1771, R. S. Bouvier, Law Dict. KINDRED; Wood, Inst. 50; 2 Bl. Comm. 253; *State ex rel. Att'y Gen. v. People's M. B. Asso.* 42 Ohio St. 579; *State ex rel. Att'y Gen. v. Standard L. I. Asso.* 38 id. 281; *Nat. M. A. Asso. v. Gonser*, 43 id. 1; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Supreme Lodge v. Nairn*, 60 Mich.

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44. See *Kentucky M. Ins. Co. v. Miller's Adm'r*, 13 Bush (Ky.), 489; *State v. Cent. M. R. Asso.* 29 Ohio St. 399; *Mut. B. Asso. v. McAuley*, 2 Mackey (D. C.), 70; *McClure v. Johnson*, 56 Iowa, 620; *Greeno v. Greeno*, 23 Hun, 478; *Mut. B. Asso. v. Hoyt*, 46 Mich. 473; *Mich. M. B. Asso. v. Rolfe*, 76 id. 146; *People v. Golden Rule Co.* 114 Ill. 34, 35; *Golden Rule v. People*, 118 id. 499; *Rockhold v. Canton M. B. Asso.* 129 id. 440; *Palmer v. Welch*, 132 id. 141. The secret agreement claimed to have been made was unlawful, and plaintiff cannot recover thereon. 1 Lewin, Trusts, top p. 182, ch. 2; Brett's L. C. in Eq. *6, note 15; Bispham, Eq. (4th ed.), sec. 56; Tiff. & B. Trusts, 124; Perry, Trusts (4th ed.), secs. 63, 65; *Muckleston v. Brown*, 6 Ves. 52, 67; *Strickland v. Aldridge*, 9 id. 516; *Russell v. Jackson*, 10 Hare, 204; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Podmore v. Gunning*, 7 Sim. 644. This suit is in the nature of an action for specific performance, and in order to establish his right to a recovery plaintiff is obliged to plead and prove the illegal agreement. *Melchoir v. McCarty*, 31 Wis. 255; *Clarke v. Lincoln L. Co.* 59 id. 655; *Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co.* 75 id. 224; *Gilmore v. Roberts*, 79 id. 453: *Marshal v. Railroad Co.* 16 How. 314; *Bank v. Owen*, 2 Pet. 539; Pomeroy, Spec. Perf. 284–6; *Wight v. Rindskopf*, 43 Wis. 344; *Guernsey v. Cook*, 120 Mass. 501; *Setter v. Alvey*, 15 Kan. 157; *Creath v. Sims*, 5 How. 204; *Bestor v. Wathen*, 60 Ill. 138; *Snell v. Dwight*, 120 Mass. 9; *Watson v. Murray*, 23 N. J. Eq. 257; *Green v. Carrigan*, 87 Mo. 359; *Gould v. Kendall*, 15 Neb. 549; *Sykes v. Beadon*, 11 Ch. Div. 196.

For the respondent there was a brief by *Burr W. Jones* and *F. J. & C. F. Lamb*, and oral argument by *Mr. F. J. Lamb* and *Mr. Jones*. They argued, among other things, that on the language of sec. 1771, R. S., plaintiff could have recovered on the certificate of July 19, 1890, had Miss Nash died before it was surrendered. The statute is to be liberally construed to further the object for which the cor-

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poration is organized, the choice of means being left to the corporation. *Mygatt v. N. Y. P. Ins. Co.* 21 N. Y. 53–55; *Rockhold v. Canton M. B. Asso.* 129 Ill. 440, 445; *Maneely v. Knights*, 115 Pa. St. 305. Plaintiff might be held to be of the "family" of Miss Nash. *Carmichael v. N. W. Mut. B. Asso.* 51 Mich. 494; *McCarthy v. N. E. Order of P.* 153 Mass. 314; *Poor v. Hudson Ins. Co.* 2 Fed. Rep. 432; Anderson, Law Dict. FAMILY; *Merritt v. Baldwin*, 6 Wis. 439, 446. The certificate of July 19, 1890, was issued in exact conformity with the articles of the association, and the association would be estopped from disputing its liability thereon. 2 Morawetz, Corp. 689; *Bradley v. Ballard*, 55 Ill. 415; *Darst v. Gale*, 83 id. 136; Bacon, Ben. Soc. sec. 265; Niblack, Ben. Soc. sec. 7; *Matt v. Roman Cath. M. P. Soc.* 70 Iowa, 455; *Knights of Honor v. Watson*, 64 N. H. 517; *Baker v. Gee*, 1 Wall. 333, 337; *Germantown Ins. Co. v. Dhein*, 43 Wis. 420. The money having been voluntarily paid to defendant, she could not set up the illegality of the original trust and thus retain the property. 1 Pomeroy, Eq. Jur. sec. 403, note 2; *Thomson v. Thomson*, 7 Ves. 470; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, id. 296; *Sharp v. Taylor*, 2 Phil. 801; *Joy v. Campbell*, 1 Sch. & Lef. 338–9; *McBlair v. Gibbes*, 17 How. 232; *Brooks v. Martin*, 2 Wall. 81; *Worthington v. Curtiss*, L. R. 1 Ch. Div. 419, 423–4; *Heckman v. Swartz*, 50 Wis. 267, 270. The objection that plaintiff had not an insurable interest in the life of Miss Nash does not apply because she procured the insurance at her own expense. *Bloomington M. L. B. Asso. v. Blue*, 120 Ill. 121, and cases cited; Bacon, Ben. Soc. sec. 249; 11 Am. & Eng. Ency. of Law, 318; 1 May, Ins. sec. 112.

CASSODAY, J. The findings of the court are fully sustained by the evidence.

It is contended that the plaintiff had no insurable interest in the life of Fannie E. Nash. The learned counsel for the

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defendant cites numerous cases to the effect that one procuring insurance upon the life of another cannot recover upon the policy without proving an interest in the life assured. The theory upon which such decisions are based is that such a contract is nothing more than a wagering or gambling contract, and hence is against public policy, and is therefore void. It is very questionable whether such a policy was void by the common law of England prior to 1774. *Lucena v. Craufurd*, 3 Bos. & P. 75; *Cousins v. Nantes*, 3 Taunt. 513; *Dalby v. India & L. L. Ass. Co.* (15 Com. B.) 80 Eng. C. L. 365. In the year named, the statute of 14 Geo. III. c. 48, was enacted, and is to the effect that thereafter "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gambling or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever." 12 Eng. Stats. at Large, 90. The preamble to the act speaks of it as a remedy for an existing mischief. The act is general in its terms, and does not purport to extend to any English colony, and it was held as late as 1832 that it did not extend to Ireland. *Shannon v. Nugent*, Hayes, 536; *British Ins. Co. v. Magee*, Cooke & A. 182. In *Spaulding v. C. & N. W. R. Co.* 30 Wis. 117, 118, it was held, in an opinion by DIXON, C. J., that the statute of 14 Geo. III. c. 78, passed the same year and about the same time, was never in force in Wisconsin, for the reason that its passage was so near the Revolution that it was never received and acted upon as a part of the common law in this country. But cases are cited by counsel from courts of high authority holding that the act of 14 Geo. III. c. 48, was merely confirmatory of the common law

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as it previously existed in England, while others assume that the common law was and is as therein embodied, without making any reference to the act. So, some of the cases cited seem to have gone so far as to hold that if a creditor, having an insurable interest in the life of his debtor, obtains an insurance thereon in his own favor, and the debt is subsequently paid or extinguished during the life of the assured, or the policy is assigned to one having no insurable interest in the debtor's life, such policy cannot be enforced against the company. But this court has held that a policy of life insurance obtained in good faith by a person having an insurable interest in the life assured may be assigned to *any person* with the consent of the company; that an assignment by a son of insurance policies on his own life, as security for a debt due from his father to the assignee, is valid. *Bursinger v. Bank*, 67 Wis. 75, and cases there cited by Mr. Justice TAYLOR. The same principle seems to be sanctioned in England, notwithstanding the statute quoted. It has there been held that, "where a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it by reason of the provisions of the 14 Geo. III. c. 48." *Dalby v. India & L. L. Ass. Co.* (15 Com. B.) 80 Eng. C. L. 365. This is put upon the theory that a contract of life insurance is not a contract of indemnity, but is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of certain annual premiums during his life. That case has been repeatedly cited with apparent approval by the English courts. *Knox v. Turner*, L. R. 9 Eq. 163; *Rankin v. Potter*, L. R. 6 H. L. 119; *Bradburn v. G. W. R. Co.* L. R. 10 Exch. 2; *Burnand v. Rodocanachi*, L. R. 7 App. Cas. 340. See, also, *Morrell v. Trenton M. L. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92.

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But in the case at bar the plaintiff did not, as a creditor or otherwise, procure the insurance in question. On the contrary, the same was procured by Fannie E. Nash upon her own life, payable as indicated. The contention is that the company had no lawful authority to insure her life, directly or indirectly, for the benefit of the plaintiff, and hence that, in so far as she attempted to do so in the name of the defendant as trustee, the policy is *pro tanto* void. The statute authorized the formation of a corporation in the manner therein provided, to promote the several objects therein named, and, among others, "for the *mutual support of the members, their families or* kindred in cases of sickness, misfortune, poverty, or death, or for any lawful business or purpose whatever, except," as therein specifically named. Sec. 1771, R. S. The by-laws of the association provided that "the object and business of the association shall be to *furnish pecuniary relief to its members when disabled by sickness or accident*, and to provide a mortuary benefit for the *burial of its members and relief of their families or* kindred." It is undisputed that Miss Nash was an invalid for six or seven years immediately prior to her death; that during that time she lived and made her home for most of the time with the plaintiff and as a member of his family; that while she was there one of her limbs was amputated, and she was much of the time under the care of a physician; that she was a blood relative of the plaintiff's wife and their son, as mentioned in the foregoing statement; that from January 27, 1885, to December 17, 1891, her life was insured in this same company; that during the fore part of this time, and for about four years, one fourth of the amount of the insurance was expressly payable to the plaintiff; that during the most of the balance of the time about one half of the amount was expressly payable to the plaintiff; that the last change in the form of the policy, making $3,900 of the amount payable to the defend-

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ant upon her agreement to receive and hold the same in trust, and from the amount so received pay over to the plaintiff $1,950, as found by the court, was merely to obviate a supposed legal objection to the form of the policy. In all these transactions the manifest purpose of Miss Nash was to secure for herself a home, maintenance, and support in the family of the plaintiff, and to remunerate him for the same by way of such insurance. It was certainly a very appropriate way, if not the only way, in which she as a member of the order could, in the language of the statute, "receive the mutual support of the (other) members," or could be furnished with pecuniary relief by the other members. Neither the statute nor the by-laws limit the beneficiaries to blood relatives.

In *Barnes v. London, E. & L. L. Ins. Co.* [1892] 1 Q. B. 864, an action was brought to recover the amount of a policy of insurance upon the life of a child ten years old, a step-sister of the plaintiff, and it appeared that the plaintiff had promised the mother of the child to take care of and help maintain it; and it was "held that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objections as to the amount in fact expended by her, to recover the amount of the policy." Lord Coleridge, C. J., in effect said that it appeared that the plaintiff had undertaken the burden of keeping and maintaining the child. That "that was a duty not cast upon her by law, but was wholly self-imposed. . . . In that state of circumstances it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected. That is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here? I think there is. . . . I cannot find that anything has been said in any case to a contrary effect." And in one of the cases cited by counsel

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for the defendant, Mr. Justice FIELD, speaking for the whole court, said: "It is not very easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either *pecuniary*, or of blood or *affinity*, to expect some benefit or advantage from the continuance of the life of the assured." *Warnock v. Davis*, 104 U. S. 779.

But, as indicated, the case at bar is more favorable to the validity of the insurance, since Miss Nash procured the insurance on her own life, in part to remunerate and compensate one to whom she was under great moral, if not legal, obligations. Upon her death the company promptly paid the money to the defendant, as agreed in the policy. It is, at least, very doubtful whether the company could have successfully resisted such payment, had it made the attempt; but that question is not before us for determination. Even assuming that the company might have successfully resisted such payment, yet we are clearly of the opinion that in voluntarily making the payment the company violated no statute nor any principle of the common law or of good morals. The defendant, therefore, came into the lawful possession of the money. As indicated in the foregoing statement, the plaintiff surrendered the previous outstanding certificate, and he and Miss Nash consented and agreed that a new certificate should be taken

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out in the name of the defendant; but this was done only upon the express agreement of the defendant that she would receive $1,950 of the amount in trust for the plaintiff, and pay the same over to him. By virtue of the agreement so made by the defendant, Miss Nash, and the plaintiff, the defendant has since received the money. The precise question for determination, therefore, is whether the defendant can retain that money for her own use, in violation of that agreement. We are clearly of the opinion that she cannot. *Kiewert v. Rindskopf*, 46 Wis. 481; *Heckman v. Swartz*, 50 Wis. 267; *Wells v. McGeoch*, 71 Wis. 196; *Remington v. Ward*, 78 Wis. 539; *Gilmore v. Roberts*, 79 Wis. 450. These cases have repeatedly affirmed the proposition that if A. receives money from B. for the purpose of paying it to C. upon an agreement between them, he cannot retain the money so received on the ground that the agreement between B. and C. was illegal.

By the Court.— The judgment of the circuit court is affirmed.

See note to this case in 21 L. R. A. 746.—REP.

BECKER, Appellant, vs. KNUDSON, Respondent.

September 7 — September 26, 1893.

Deed: Covenant against incumbrances: Estoppel: Parol evidence: Manner of paying consideration.

1. After the execution and delivery of a conveyance of land the grantee retained the entire consideration under an agreement that he would apply it to the payment of existing incumbrances, against which there was a covenant in the deed. Afterwards, upon a settlement between the parties, the grantee represented that he had paid a certain incumbrance, and took credit therefor, though he had not in fact paid it. *Held*, that he was estopped thereafter to claim a breach of the covenant by reason of said incumbrance.

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2. Parol evidence of the above facts did not tend to contradict or vary the effect of the deed or covenant.
3. Parol evidence is admissible to show in what manner the consideration named in a deed is to be paid.

APPEAL from the Circuit Court for *Dane* County.

This is an action on the covenant against incumbrances in a deed of conveyance from the defendant to the plaintiff of a certain farm, dated June 1, 1871, except as to two certain mortgages thereon, and the entire consideration for the conveyance was $2,600. There were quite a number of other incumbrances by judgments for small amounts, and among them one against the defendant in favor of S. L. Sheldon, docketed July 30, 1867, upon which execution had issued, and the farm had been sold June 28, 1870, to said Sheldon for $83.75, and the certificate of sale had been assigned to W. A. P. Morris. Subsequently, April 12, 1878, the farm remaining unredeemed, it was conveyed by sheriff's deed to Morris, and on the 17th of June, 1878, the plaintiff was compelled to pay him $500 to regain the title, which sum, with interest, he sought to recover in this action. It was contended and proved on behalf of the defendant, and found by the court (under objections on the part of the plaintiff that parol evidence was not admissible to contradict, vary, or explain the deed or covenant in question), in substance, that at the time of the execution and delivery of the deed, as the defendant was then unable to pay off the incumbrances on the farm, the plaintiff was to retain the entire purchase money,— $2,600,— and with and out of it pay off all existing incumbrances against the land, and account for and pay over the balance to the defendant; that the plaintiff failed to redeem said sheriff's certificate of sale on the judgment in favor of Sheldon, although he had timely notice of its existence; that the parties had a settlement in relation to the moneys he had paid out for incumbrances and to the defendant, about two

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years after the date of the deed, when they had and used an abstract of title procured at the joint expense of the parties, which showed all incumbrances against the land, including the Sheldon judgment and certificate of sale thereon; that the plaintiff represented to the defendant and claimed that he had paid all incumbrances so shown, and the parties settled on that basis, the defendant believing such claim to be true, and the plaintiff then paid over to him the balance found due to the defendant,—$68.15; that the defendant thereafter gave the matter of said incumbrances no further attention. This was about six years before the sheriff's deed was executed to Morris. The failure of title complained of was caused by the neglect of the plaintiff to apply in payment and redemption of the sheriff's sale the moneys retained by him for that purpose, as he had agreed to do. There was considerable conflict in the evidence, but it sustains the finding of the court. Judgment was given for the defendant, and the plaintiff appealed.

The cause was submitted for the appellant on the brief of *J. M. Becker*, and for the respondent on that of *J. W. Leary* and *Richmond & Smith.*

Pinney, J. The contention of the plaintiff that the evidence to sustain the defense was not admissible is, we think, founded upon a misapprehension of the nature of the transaction and the purpose for which the evidence was introduced. After the execution and delivery of the deed the plaintiff retained the entire consideration and held it upon the trust and agreement that he would apply it to the payment of existing incumbrances on the land, which the defendant was bound by his covenant to pay, and in the payment of which the plaintiff had a special interest. He assumed and undertook to do with the defendant's money what the defendant was himself in duty bound to do. The

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plaintiff was not bound to take upon himself this trust or duty, but having undertaken it and entered upon its performance it was his duty, without other consideration, to use ordinary care and vigilance in that behalf, and for a failure to do so he would be liable for the damage ensuing. *Jones v. Parish*, 1 Pin. 494. He took credit in the subsequent settlement with the defendant for having paid off the incumbrance, when he had not in fact paid it, and he seeks by this action to charge the defendant with the consequences of his own misrepresentation and subsequent negligence. To allow him to do so would be to permit him to take advantage of his own wrongful conduct, and would operate as a surprise and fraud upon the defendant. According to the effect of the finding of the court, the plaintiff still holds the defendant's money to the amount of the incumbrance complained of as a breach of the covenant in question, and he now contends that this incumbrance was not in fact paid off as he represented when he settled with the defendant and obtained credit for the amount upon the faith of his representation of payment. The defendant, relying upon the truth of this representation, gave the matter no further attention until it was too late to redeem the premises. The plaintiff cannot be allowed now to change his position. In getting in the title on the sheriff's sale he has simply performed a duty he owed to the defendant. In equity, as between these parties, this incumbrance must be treated as having been paid, and the plaintiff is now estopped to claim to the contrary. This is the result of the plainest principles. The evidence in question did not contradict, vary, or change the effect of the deed or covenant. It did not show or tend to show that the incumbrance was not to be paid off by the defendant, but that it was to be paid out of his own money in the plaintiff's hands for that purpose, and that, in consequence of the plaintiff's representations

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that he had paid it and taking credit therefor in the settlement, and the defendant's reliance thereon until after the time for redemption had expired, he is estopped from asserting that the title founded on the sheriff's deed which he has bought in is a breach of the defendant's covenants in his deed. In buying in this title to protect himself in the possession of the farm, as to the defendant, he was at a late day performing the duty he had long owed to him. Manifestly, he cannot found a cause of action upon this fact. Besides, the evidence showed in what manner the consideration named in the deed was to be paid, and parol evidence was clearly competent for that purpose. *Schillinger v. McCann*, 6 Me. 364; *Burbank v. Gould*, 15 Me. 118; *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 206, and cases there cited; *Altringer v. Capeheart*, 68 Mo. 441; *Drury v. Tremont Imp. Co.* 13 Allen, 171; *Hahn v. Doolittle*, 18 Wis. 196.

The defendant's covenant against incumbrances was broken by the existence of the incumbrances as soon as made, and turned in respect to them into mere rights of action. It was competent, not only for the parties to agree in what particular manner this covenant should be extinguished, but how and in what manner the cause of action which had incidentally accrued on it should be discharged. The case in this respect is in principle the same as *Jones v. Keyes*, 16 Wis. 562, where the defendant gave the plaintiff his note for the price of certain letter boxes, drawers, and post-office furniture, with a parol agreement that each should receive his proportionate share of the rent of the boxes, etc., during the quarter when the defendant took possession of the office, and that his share, when ascertained and received, should be indorsed on the note, and it was held competent to show by parol such contemporaneous agreement as to the manner in which the note was to be

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paid. The evidence admitted in this case was clearly competent for similar reasons, and it showed the plaintiff had no right of action, as the circuit court rightly held.

By the Court.— The judgment of the circuit court is affirmed.

SMITH, Respondent, vs. SCHREINER, Administrator, Appellant.

September 7 — September 26, 1893.

Judgment: Res adjudicata: *Effect of appeal.*

A mere appeal does not affect a judgment as a bar to another action.

APPEAL from the Circuit Court for *Dane* County.

The plaintiff, *Julia S. Smith*, petitioned the county court of Grant county for an order that the defendant, as administrator *de bonis non* with the will annexed of J. H. Hyde, deceased, forthwith pay over to her a legacy of $600 given her by said will. The defendant by a counterclaim asked, among other things, an adjudication that the plaintiff had received all, and more than, she was entitled to under the will. Upon a hearing before the county court of Crawford county (because of the prejudice of the county judge of Grant county) the petition was dismissed. The plaintiff appealed, and the venue was changed to Dane county. The circuit court adjudged that the petition should be granted, and from the judgment entered accordingly the defendant appealed.

For the appellant there were briefs by *Bushnell & Watkins*, and oral argument by *A. R. Bushnell.* They contended, *inter alia*, that an appeal, during its pendency, suspends or supersedes the judgment or decree appealed from. *Keyser v. Farr*, 105 U. S. 265; *Draper v. Davis*, 102

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id. 370; *U. S. v. Pacheco*, 20 How. 261; *Yeaton v. U. S.* 5 Cranch, 281; *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 279; *Hudson v. Smith*, 9 id. 122; *Spaulding v. M. & H. R. Co.* 11 id. 157; Freeman, Judgm. (4th ed.), sec. 328, and cases cited; *Ambrose v. Weed*, 11 Ill. 488–491; *Helm v. Boone*, 6 J. J. Marsh. 351; *Griffin v. Seymour*, 15 Iowa, 33; *Levi v. Karrick*, id. 444; *Campbell v. Howard*, 5 Mass. 376; *Paine v. Cowdin*, 17 Pick. 142; *Davis v. Cowdin*, 20 id. 510; *Curtis v. Beardsley*, 15 Conn. 518; *Card v. Foot*, 57 id. 432; *McGarrahan v. Maxwell*, 28 Cal. 75; *Thornton v. Mahoney*, 24 id. 569; *People v. Frisbie*, 26 id. 135; *Murray v. Green*, 64 id. 369; *People v. Treadwell*, 66 id. 401; *Knowles v. Inches*, 12 id. 216; *Escurix v. Daboval*, 7 La. 579; *Turnbull v. Cureton*, 9 Martin (O. S.), 38; *Wade v. Colonization Soc.* 4 Smedes & M. 671; *Yocom v. Moore*, 4 Bibb, 221; *Long v. Hitchcock*, 3 Ohio, 274. "A judgment, if appealed from, is not final until the appeal has been determined." 21 Am. & Eng. Ency. of Law, 266, and cases cited.

For the respondent there were briefs by *Carter & Burns*, and oral argument by *W. E. Carter*.

ORTON, J. Dr. Jehiel H. Hyde executed his last will and testament November 20, and died December 7, 1869, in Grant county, this state. The will was duly probated, and one Addison Burr, named as executor in the will, was duly appointed, and made his final settlement in January, 1870, and there remained in his hands, after payment of all the debts, the sum of $7,313.61, which amount, by the order of the county court, was paid over to Mrs. Sarah Hyde, the widow of the testator, according to the will.

By the will all of the estate of the testator, real and personal, was devised and bequeathed to his wife, the said Sarah, "to have and to hold during her natural life, unless she should again marry, in which case she shall forfeit all right to the personal estate that may remain, and all right

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to the real estate or the proceeds thereof. The personal estate, before such remarriage, *she may dispose of as her necessities may require, or as her judgment may dictate to be right and expedient.*" She was authorized and empowered to sell and convey the homestead, and have the use of the proceeds during her natural life. "On her remarriage or death all the personal estate that may remain unexpended, and all the real estate or proceeds thereof, shall be equally divided among the children of the testator's brother of full blood." There was a bequest or legacy of $600 to the plaintiff, *Julia Smith*, wife of Dr. C. Stoddard Smith, to be paid at the time of the final distribution of the estate.

It appears that said Sarah Hyde, the widow of the testator, before her decease, disposed of nearly or quite all of the personal estate which came to her hands under the will, to the said *Julia Smith*, the said plaintiff, and to her husband, the said Dr. C. Stoddard Smith, of the value of five or six thousand dollars. The appellant, as the administrator of the estate *de bonis non*, brought suit in equity against the said *Julia* and C. Stoddard Smith in the circuit court of the United States for the northern district of the state of Illinois, about May 17, 1886, for the purpose of compelling them to account for such part of the estate as came to their hands by and through the said Sarah Hyde as aforesaid, and pay the same over to him as administrator *de bonis non* of said estate. On the final hearing of said suit said court dismissed the complaint therein on its merits, for want of equity, and said judgment still remains unreversed on the records of said court. It was held in said suit that the above clause of the will clothed Mrs. Sarah Hyde, the said widow of the testator, with the full power of disposition of the personal estate, and that such disposition thereof by her, in her lifetime, to the said *Julia Smith* and her husband, was absolute and binding on the residuary legatees. The said administrator *de bonis non*

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thereupon appealed from said judgment to the supreme court of the United States, where said appeal is still pending, and no *supersedeas* was granted thereon.

This action is brought by the said *Julia Smith* to recover her said legacy of $600, and the said administrator *de bonis non* has answered, setting up that the plaintiff has already in her hands said five or six thousand dollars she received from the said Mrs. Sarah Hyde as aforesaid, as a part of said estate, which should be applied to the full payment of said legacy. The plaintiff sets up the said judgment in bar of this defense as *res adjudicata* of the same matter, and between the same parties; and the circuit court so held, and rendered judgment against the appellant for said $600, less $59.25 already paid, with interest from October 1, 1889.

The main question on this appeal is therefore whether said judgment is a bar, notwithstanding said appeal. This question has not been directly decided by this court. *Neuman v. State*, 76 Wis. 112, seems, however, to decide the principle. Proceedings were taken before the village board to revoke the license of Neuman to sell liquors in the village of Bloomington. The board entered an order revoking his license. He took the case to the circuit court on *certiorari*, and the circuit court affirmed the order. He then appealed from that judgment to this court, and while the appeal was pending he was prosecuted for selling liquor without license during the time of his license if it had not been revoked; and the question was whether the order of the board did not continue in force, so as to make such selling illegal, notwithstanding the *certiorari* and the appeal, and this court held that it did, and that his conviction was legal. The order of the board was in the nature of a final judgment, and continued in force after a *certiorari* to the circuit court, and after an appeal to this court from the judgment of the circuit court affirming the order of the

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board. If this case was correctly decided, and as long as it remains the law of that case, it is difficult to see how this court can hold that an appeal from any final judgment affects the force and conclusiveness of the judgment as *res adjudicata* and as a bar to another action, for the principle appears to be precisely the same in both cases. What would be the effect upon the judgment if a *supersedeas* or stay of proceedings had been granted we need not inquire, for there was neither in this case.

In many of the states, and perhaps in most, it is held that an appeal destroys the effect of a judgment as *res adjudicata*, and, while pending, the judgment cannot be pleaded in bar to another action for the same cause between the same parties. The learned counsel of the appellant cite many of these cases. But on the other hand, in many of the states the courts of equal credit and respectability hold otherwise, and we think with better reason. In 2 Black, Judgm. § 685, the learned author says: "*Reasonable as this view appears*, it must be admitted that it is opposed by a settled line of decisions in numerous other states." "In the federal practice a writ of error to the circuit court does not have the effect, pending the proceedings, to suspend the operation of the judgment as a bar or estoppel." 2 Black, Judg. § 510, citing *Oregonian R. Co. v. Oregon R. & N. Co.* 27 Fed. Rep. 277. This being a judgment of a federal court, this practice should have weight in deciding its effect after an appeal.

In New York, by repeated decisions, an appeal does not affect the judgment as an estoppel. *Parkhurst v. Berdell*, 110 N. Y. 386; *Sage v. Harpending*, 49 Barb. 166. Such is the settled doctrine in Indiana. *Burton v. Burton*, 28 Ind. 342, and many other cases. See, also, *Young v. Brehe*, 19 Nev. 379; *Bank of N. A. v. Wheeler*, 28 Conn. 433; *Faber v. Hovey*, 117 Mass. 107; *Planters' Bank v. Calvit*, 3 Smedes & M. 143; *Scheible v. Slagle*, 89 Ind. 328; *Allen v. Mayor*,

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9 Ga. 286; *Paine v. Schenectady Ins. Co.* 11 R. I. 411; *Cloud v. Wiley*, 29 Ark. 80. Suffice it to say that in very many of the leading states this is the settled doctrine; and Mr. Freeman, on Judgments (sec. 328), seems to think that is the prevailing doctrine of the courts, and that the cases which hold otherwise are exceptional. Many of the cases which seem to hold otherwise are in admiralty, or on orders, or depending on statutes. There is a strong reason in favor of the rule, in order to discourage or prevent a multiplicity of actions between the parties for the same cause wherever possible. "*Nemo debet bis vexari pro una et eadem causa.*" There is no good reason why a mere appeal from the judgment should suspend the operation of this rule. The party should await the result in the tribunal he has selected, before vexing his adversary with other suits for the same cause. By any other rule, judgments in the same controversy, and appeals thereon, may be numberless.

We prefer to hold, therefore, that a mere appeal does not affect the judgment as a bar to another action, sustained as it is by reason and such respectable authorities. This holding disposes of all the matters in defense of the action, without which the plaintiff was entitled to recover. The circuit court properly found that the defendant, as administrator *de bonis non*, has in his hands $1,200, money belonging to said estate, and that there is no reason why a division of the estate should not be made among the children of the testator's brother according to the will.

By the Court.— The judgment of the circuit court is affirmed.

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SPITZ and another, Respondents, vs. TRIPP, Garnishee, Appellant.

September 7 — September 26, 1893.

Garnishment: Chattel mortgage.

Under sec. 2768, R. S., a garnishee cannot be held liable for property of which he had taken possession under a chattel mortgage given by the defendant, but which had passed out of his possession and control prior to the service of the garnishee summons upon him; and it is immaterial whether the mortgage was valid or invalid, or the possession so taken was lawful or unlawful, as against the defendant's other creditors.

APPEAL from the Circuit Court for *Sauk* County.

The principal defendant, J. L. Tabor, was a merchant at Prairie du Sac. On April 11, 1892, he executed a chattel mortgage upon his goods, furniture, and fixtures to the garnishee, *J. S. Tripp*, to secure the payment of $1,900 and interest, and said mortgage was filed in the office of the village clerk April 12, 1892. On July 25, 1892, the said J. L. Tabor executed another chattel mortgage on said personal property to James H. Forrester & Co. to secure the payment of $224.65, and said mortgage was filed in said clerk's office July 26, 1892. Tabor continued in the possession of said goods from April 11, 1892, to July 26, 1892, and continued to sell goods covered by said mortgages therein, as a retail merchant, using the money obtained from such sales for his own use. On July 26, 1892, the said *J. S. Tripp* took possession of all of said property unsold, under his said chattel mortgage. The value of the property so taken by him was $6,830.85, and he retained the same until September 10, 1892, except that Tabor demanded his $200 exemption therefrom, and was allowed to take the same therefrom as exempt property, leaving of said property in the possession of said *J. S. Tripp* $6,630.85. On July 28, 1892, Tabor executed another chattel mortgage

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to Amanda Oertel upon all of the goods, wares, and merchandise then in the store lately occupied by him, but then in the possession of said *Tripp*, subject, however, to the two other mortgages already mentioned, to secure the payment of $400 and accrued interest, which said mortgage was filed in said village clerk's office July 29, 1892. Tabor was a married man when he made said mortgages, and his wife failed to sign any of them.

On August 31, 1892, Tabor gave to the said *J. S. Tripp* a writing whereby he authorized and empowered him, for and in his place, upon the sale of said property, and after first applying a sufficient amount of the proceeds thereof to satisfy his own mortgage and the costs and expenses of the care of the goods and of such sale, from the surplus of the proceeds thereof to pay and discharge, first, the said mortgage to Forrester & Co., and then the said mortgage to Oertel, and with the balance of the proceeds of such sale to pay and discharge certain debts therein named, aggregating the sum of about $1,700. On September 10, 1892, the said *J. S. Tripp* sold, assigned, and transferred his interest in and to said chattel mortgage so given to him as aforesaid to one Edward P. Tabor, and thereupon delivered to the said Edward P. Tabor possession of said goods, wares, merchandise, and other property described in said chattel mortgage; and said Edward P. Tabor afterwards sold said property, and after the payment of the said mortgage of $1,900, and the interest thereon, and the payment of said mortgage of $224.65, and the interest thereon, and after the payment of the said mortgage of $400, and the interest thereon, returned to the said *J. S. Tripp* the sum of $615.09, which said sum was and still is in the hands and possession of the said *J. S. Tripp*, garnishee, and is the balance or surplus of the proceeds of such goods, wares, and merchandise and other property, and at the time of the service of the garnishee summons herein upon him, to wit, December 20, 1892, the said *J. S. Tripp* had in his

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possession and under his control the said $615.09, together with the amount which he received from the said Edward P. Tabor in payment of his own mortgage of $1,900.

On December 20, 1892, the said *J. S. Tripp*, as such garnishee, answered, denying all liability. On January 13, 1893, the plaintiffs gave notice of their election to take issue with such answer. On January 18, 1893, the plaintiffs recovered judgment against the said J. L. Tabor for $1,131.18, and the same is still due, with interest thereon. Upon the trial of the garnishee action the court found the facts, in effect, as stated, and ordered judgment thereon for the plaintiffs against the said garnishee, *J. S. Tripp*, for $1,131.18, and interest thereon from January 18, 1893, together with costs. From the judgment entered accordingly, the said garnishee, *J. S. Tripp*, appeals.

G. Stevens, for the appellant.

For the respondent there was a brief by *Grotophorst & Buckley*, and oral argument by *Herman Grotophorst*.

CASSODAY, J. It seems to be conceded that April 11, 1892, J. L. Tabor was justly indebted to the garnishee, *Tripp*, in the sum of $1,900, and that on that day he gave the chattel mortgage to secure the same as mentioned in the foregoing statement; that July 26, 1892, *Tripp* took possession of the property under his mortgage, and retained the same until September 10, 1892, when he sold, assigned, and transferred all his interest in the mortgage, and delivered the possession of all the property, to one Edward P. Tabor; that *Tripp* had nothing to do with the property thereafter, except to receive from the proceeds of the sale thereof enough to satisfy his mortgage debt, and $615.09 in addition. At the time the garnishee summons was served upon *Tripp*, December 20, 1892, he still was in possession of the $615.09, and is liable as garnishee for that amount, unless held by some prior claim.

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The statute provides that "*from the time of the service* of the summons upon the garnishee, he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects *in his possession, or under his control*, belonging to the defendant, or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects, held by a conveyance, or title, void as to the creditors of the defendant, shall be embraced in such liability." Sec. 2768, R. S. Under this statute, *Tripp* cannot be held liable, as garnishee, for any property, moneys, credits, or effects belonging to the principal debtor, which had passed out of his possession or control more than three months prior to the service of the garnishee summons upon him. Had *Tripp* been garnished by the plaintiffs at any time between July 26, 1892, and September 10, 1892, then the validity of the mortgage, and *Tripp's* right to hold possession of the goods, would have been involved, and might have been determined. *La Crosse Nat. Bank v. Wilson*, 74 Wis. 398; *Edwards v. Roepke*, 74 Wis. 575. But, upon the facts of this case, it is immaterial whether the mortgage was valid or invalid, or such possession lawful or unlawful, as against J. L. Tabor's other creditors, since none of them during that time proceeded against the property or *Tripp* as garnishee. *Tripp* certainly had the legal right to sell his mortgage, and to receive payment of his debt, whether it came to him from J. L. Tabor or Edward P. Tabor. This is not an action for trespass or conversion, nor is there any question of unlawful preference involved.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion, and for further proceedings according to law.

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THE STATE, Respondent, vs. BAETZ and others, Appellants.

September 8 — September 26, 1893.

Examination of defendants to enable plaintiff to plead.

1. In an action by the state against a former state treasurer and the sureties on his official bond to recover interest alleged to have been received by him on state funds deposited in banks, an examination of the defendants, under sec. 4096, S. & B. Ann. Stats., for the purpose of enabling the plaintiff to frame its complaint, was properly allowed upon an affidavit showing that, while plaintiff knew the aggregate amount of moneys deposited in banks during each quarter of the treasurer's term of office, it did not know the banks where it was deposited, the rates of interest received thereon, the dates of the deposits, the duration or terms of the deposits, the amounts received therefor by the treasurer, nor the proportion of such deposits which properly belonged to the general fund and to the various trust funds in the custody of the treasurer.
2. The sureties, being parties to the action, cannot be relieved from an examination.

APPEAL from the Circuit Court for *Dane* County.

Plaintiff sues to recover interest moneys on state funds deposited in banks, alleged to have been received by defendant *Baetz* while state treasurer, and not accounted for. The remaining defendants are sureties upon *Baetz's* official bond. The summons was served without complaint, and an affidavit was also served, upon which notice of the examination of defendants *Baetz*, *Pabst*, and *Pritzlaff* under sec. 4096, S. & B. Ann. Stats.,[1] was given. The affidavit

[1] Sec. 4096, S. & B. Ann. Stats., provides that if the examination be taken before issue joined, the notice shall be accompanied by an affidavit stating the general nature and object of the action, that discovery is sought to enable the party to plead, and the points upon which such discovery is desired, "and such examination shall be limited to the points so stated, unless the court or presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order further limit the subjects to which such examination shall extend."
— REP.

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was long and showed that, while plaintiff knew the aggregate amounts of moneys deposited in banks during each quarter of *Baetz's* term of office, it did not know the banks where it was deposited, the rates of interest received thereon, the dates of the deposits, the duration nor terms of the deposits, the amounts received therefor by *Baetz*, the proportion of such deposits which properly belonged to the general fund and to the various trust funds in the custody of the treasurer. The plaintiff's claim is that the defendants' examination upon these points is necessary to enable it to frame a complaint. The defendants claim that the affidavit shows that no such examination is necessary, and they made a motion in the circuit court that the examination be forbidden, or that it be restricted to the defendant *Baetz* alone, and confined to such points of inquiry as in the judgment of the court may be necessary to enable plaintiff to frame a complaint. From an order denying this motion, defendants appeal.

For the appellants the cause was submitted on the brief of *Winkler, Flanders, Smith, Bottum & Vilas.* They contended, *inter alia*, that the affidavit shows the plaintiff to be in possession of all the facts required to frame a complaint either for breach of the bond or for an accounting. Full knowledge of everything is shown except accuracy of figures. All that can be alleged as an excuse for an examination is that plaintiff is not able to state the *ad damnum* with accuracy. As to the sureties there is no presumption of law, and there is certainly no intimation of fact, that disclosures on their part are required to enable the state to frame a proper complaint.

For the respondent there was a brief by the *Attorney General* and *R. M. Bashford*, and oral argument by *Mr. Bashford.*

WINSLOW, J. Doubtless the plaintiff could frame some sort of a complaint without the examination applied for.

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It is manifest, however, that such complaint would be entirely indefinite as to amounts claimed, and would have to be framed in the most general way. We see no good reason why the proposed examination should not be had, in order that the complaint may, if possible, be made definite and certain in the particulars concerning which discovery is sought.

This court has uniformly given this statute a broad and liberal construction in favor of the right conferred by it as to all matters relevant to the controversy. *Kelly v. C. & N. W. R. Co.* 60 Wis. 480; *Nichols v. McGeoch*, 78 Wis. 360. The sureties, being parties to the action, cannot be relieved from an examination. The statute gives the right to examine a "party." If they are ignorant of the facts involved in the inquiry, their examination will necessarily be brief.

By the Court.— Order affirmed.

PINNEY, J., took no part.

SCHILTZ, Appellant, vs. ROENITZ, Respondent.

September 8 — September 26, 1893.

Parent and child: Adoption: Notice to parent.

An order of adoption, based on the abandonment of the child by the parent, is a nullity as against the latter if he had no notice of the proceeding or opportunity to defend.

APPEAL from the Circuit Court for *Outagamie* County.

Action by the plaintiff for the recovery of damages for being deprived by the defendant of the services of his minor daughter since the 28th of December, 1887, and for alienat-

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ing and estranging her affections from the plaintiff, her father. The complaint has annexed to it, as an exhibit and part thereof, certain alleged proceedings for the adoption by the said defendant and Rosa, his wife, of the plaintiff's daughter Mary, representing their desire to adopt her, and alleging that she was a child of *John Schiltz* and Christina, his wife, who is deceased; that the said Mary was then thirteen years of age, and that *John Schiltz*, the plaintiff, abandoned her and his other children in 1884, and had not since been heard from; that the petitioners are of sufficient ability to bring up said child and furnish her suitable culture and education; and that she has no general guardian. The petition prayed an order of adoption from the court, and that from and after the date thereof such child be deemed, to all legal intents and purposes, the child of the petitioners, and was verified. Indorsed on the petition was the consent of Jacob Imig to such adoption, reciting that he had been duly appointed by the county court of Sheboygan county to consent thereto. Annexed to the complaint is an order which recites, in substance, the allegations of the petition, that the said Mary has no guardian, and appointing said Imig for the purpose of appearing for said child and consenting to said adoption if he shall deem it best; also, an order reciting the substance of the petition, and the appointment of Imig, and his consent, under sec. 4022, ch. 173, R. S., and that the court being satisfied of the identity and relation of the persons, and that said petitioners have sufficient ability to bring up and furnish suitable culture and education for said child, having reference to the degree and condition of its parents, and that it is proper for such adoption to take effect, it was thereupon ordered that from and after the date thereof said Mary Schiltz should be, to all legal intents and purposes, the child of the petitioners, *Charles H. Roenitz* and Rosa, his wife.

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It was alleged that the defendant had retained said plaintiff's child in his possession up to the present time, against the will of the plaintiff; that the allegation of abandonment was untrue; that he had attempted to regain possession and control of his daughter, and the defendant had retained her, threatening the plaintiff with personal violence if he attempted to get possession of his child. The proceedings in the county court are alleged as the ground of the defendant's detention of the daughter. There is nothing on the face of the proceedings or connected therewith to show that any notice thereof was ever given to the plaintiff or that he ever consented to the order of adoption.

The defendant answered the complaint, and at the trial objected to any evidence under it, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the objection, and dismissed the plaintiff's complaint, and from this judgment the plaintiff appealed.

G. W. Foster, for the appellant, argued, among other things, that the proceedings before the county judge were without notice to the plaintiff, and therefore void. *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328; *Seifert v. Brooks*, 34 id. 443, 447; *Sanger v. Mellon*, 51 id. 560; Hawes, Jurisdiction, sec. 12; *Windsor v. Mc Veigh*, 93 U. S. 274; *Wynehamer v. People*, 13 N. Y. 394–5. The evidence upon which the court acts must be preserved as a part of the record; or so much, at least, as confers jurisdiction. *Niblo v. Post's Adm'rs*, 25 Wend. 291; *People v. Overseers*, 15 Barb. 286.

Simon Gillen, for the respondent, contended, *inter alia*, that the complaint was fatally defective in this, that it attempts to state a cause of action founded upon a collateral attack upon a judgment or final order of a court acting within its prescribed statutory jurisdiction, and does not allege a want of jurisdiction of the subject matter, loss of

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jurisdiction during the proceedings, fraud, or collusion, which are the grounds of collateral attacks upon judgments, decrees, or final orders of courts of subordinate or co-ordinate jurisdiction. Van Fleet, Collateral Attack, secs. 5, 16; Freeman, Judgm. (3d ed.), secs. 120, 121, 334–336; Freeman, Void Judicial Sales, secs. 7, 8; *Gilliland v. Sellers*, 2 Ohio St. 223; *Greene v. Greene*, 2 Gray, 361; *Mason v. Messenger*, 17 Iowa, 261; *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252; *Jackson v. Astor*, 1 Pin. 137. The county court of Sheboygan county had jurisdiction of the subject matter of the adoption proceedings, and retained it to the end. S. & B. Ann. Stats. secs. 2443, 4021, 4024; *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328; Gary, Probate Law, sec. 861; 3 Pomeroy, Eq. Jur. sec. 1308; Brown, Jurisdiction, sec. 79. Adoption proceedings are proceedings *quasi in rem.* Brown, Jurisdiction, sec. 80. The allegation that the plaintiff never abandoned his child only sets out a mistake of fact, which fact is found affirmatively by the county court in its order of adoption, and is one of the affirmative facts upon which the order of adoption finds a legal foundation, and can only be questioned by an application to the county court for review, appeal, writ of error, *certiorari*, or *habeas corpus*. *Baker v. Baker*, 51 Wis. 539; *In re Fisher*, 15 id. 512; *Estate of Leavens*, 65 id. 440; Story, Eq. Jur. sec. 896, and note; *Eyster's Appeal*, 65 Pa. St. 473; *Western Union R. Co. v. Dickson*, 30 Wis. 389; S. & B. Ann. Stats. secs. 4031–35, 4046–48; Van Fleet, Collateral Attack, secs. 2, 17, 801; Gary, Probate Law, sec. 871, note; *Gaston v. Babcock*, 6 Wis. 503; *Gunn v. Green*, 14 id. 317; *Jamison v. Snyder*, 79 id. 286; *Shuman v. Hurd*, id. 654; *State v. Prince*, 45 id. 610; *In re Pierce*, 44 id. 411–426; *Petition of Semler*, 41 id. 523; *Petition of Crandall*, 34 id. 177. The record in the adoption proceedings is absolute verity, to contradict which there can be no argument or evidence. *Jackson v. Astor*, 1 Pin. 137; *Tall-*

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man v. McCarty, 11 Wis. 401; *Arnold v. Booth*, 14 id. 180; *Wanzer v. Howland*, 10 id. 8; *Falkner v. Guild*, id. 563; *Amory v. Amory*, 26 id. 152; *Frankfurth v. Anderson*, 61 id. 107; *Salter v. Hilgen*, 40 id. 363; Freeman, Judgm. sec. 319*a*; Brown, Jurisdiction, sec. 127; Van Fleet, Collateral Attack, secs. 17, 61; *Barker v. Barker*, 14 Wis. 131; *Cummings v. Cummings*, 123 Mass. 271. The recitals in the order of adoption take the place of findings and show a compliance with the provisions of secs. 4021–4024, S. & B. Ann. Stats. The petition being regular in form and reciting sufficient to confer jurisdiction, the conclusion of the county court, the order of adoption, is not open to a collateral attack. Brown, Jurisdiction, secs. 61, 127; Freeman, Judgm. sec. 319*a*; *Voorhees v. Bank of U. S.* 10 Pet. 449; *Thompson v. Tolmie*, 2 id. 157; *Comstock v. Crawford*, 3 Wall. 396; *Petition of Crandall*, 34 Wis. 177; *In re Pierce*, 44 id. 411; S. & B. Ann. Stats. secs. 4046–4048; *Brunson v. Burnett*, 2 Pin. 185; *In re Fisher*, 15 Wis. 511. The petition and final order in the adoption proceedings reciting and finding as an affirmative fact the abandonment of the child by the plaintiff, the plaintiff is estopped from questioning the finding of the county court in that respect, in this, a collateral, action. The facts so alleged and found being essential to the jurisdiction of the county court became *res adjudicata* and cannot be questioned by the plaintiff in this action. Freeman, Judgm. sec. 248; *Ward v. Price*, 1 Pin. 101; *Woodward v. Hill*, 6 Wis. 143; *Wright v. Sperry*, 25 id. 617; *Heath v. Frackleton*, 20 id. 320; *Strong v. Hooe*, 41 id. 659; *Danaher v. Prentiss*, 22 id. 311; *Shepardson v. Cary*, 29 id. 34; *Iowa Co. v. Mineral Point R. Co.* 24 id. 93; *Nash v. Church*, 10 id. 303; *Tallman v. McCarty*, 11 id. 402; *Driscoll v. Damp*, 16 id. 106; *Arnold v. Booth*, 14 id. 180; *State v. Waupaca Bank*, 20 id. 640; *Van Pelt v. Kimball*, 18 id. 362; Brown, Jurisdiction, sec. 4. The order of adoption conclusively establishes that it was a proper order to

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take effect. It cannot be collaterally avoided by showing that the petition and order of adoption were false. Van Fleet, Collateral Attack, sec. 61; *Jackson v. Crawfords*, 12 Wend. 533; *Fitch v. Miller*, 20 Cal. 382; *Haynes v. Meeks*, id. 288; *McCauley v. Harvey*, 49 id. 497; Freeman, Void Judicial Sales, sec. 14; Brown, Jurisdiction, sec. 60; *Ryan v. Varga*, 37 Iowa, 80; *Knox Co. v. Aspinwall*, 21 How. 539; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Koehler v. Hill*, 60 Iowa, 566; *Slack v. Blackburn*, 64 id. 375.

The primary dominion and right of a father or parent may be lost or forfeited by the father or parent by neglect or abuse of the moral or physical welfare of the child. 2 Bishop, Mar., Div. & Sep. secs. 1163–1166; 2 Lawson, Rights, Rem. & Pr. sec. 816; *State v. Smith*, 6 Me. 462, 20 Am. Dec. 324; *Cowls v. Cowls*, 3 Gilm. (Ill.), 435, 44 Am. Dec. 708; *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, and note. Statutes authorizing adoption or other disposition of children found to be neglected by their parents or guardians are constitutional and humane. *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Petition of Ferrier*, 103 Ill. 367; *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. (Pa.), 9. When the parents have abandoned their infant children and during such abandonment the care, custody, training, and education of the children have been transferred to another without legal formality, and the social, moral, and educational interests of the child will be best promoted by its remaining in the custody of the person to whom it was transferred when abandoned, the new custody will be treated as lawful and exclusive. *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Bonnett v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810; *Jones v. Darnall*, 103 Ind.

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569, 53 Am. Rep. 545. The petition for adoption alleges as the ground for the adoption the abandonment of the child by the plaintiff in 1884, and that the plaintiff has not been heard from since; and these allegations being found affirmatively by the county court, the plaintiff was not entitled to notice. *Luppie v. Winans*, 37 N. J. Eq. 245; *In re O'Neal*, 3 Am. Law Rev. 578.

PINNEY, J. It is not disputed but that a father has dominion, by right, over his minor children, nor that such primary right may be lost or forfeited by him by abandonment, neglect, or abuse. The right of the parent is not absolute and unconditional. The necessities and well-being of the social state enter so largely into the question of the dominion and control of the parent over his child that, in the interest of society and the physical and moral necessities of the child, the entire subject is one of appropriate legislation, providing in what manner the parent may be deprived or restrained in the exercise of his natural rights by reason of neglect, abandonment, or abuse. All this is well established by approved text writers and numerous adjudications. Schouler, Dom. Rel. § 248; *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328; *Sheers v. Stein*, 75 Wis. 44; *Petition of Ferrier*, 103 Ill. 367; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Farnham v. Pierce*, 141 Mass. 203; *Clark v. Bayer*, 32 Ohio St. 299. The principle stated in these cases finds expression in the provision of our statute (sec. 3964) that "the father of the minor, if living, and in case of his death the mother, while she remains unmarried, being themselves respectively *competent* to transact their own business, *and not otherwise unsuitable*, shall be entitled to the care and custody of the person of the minor." The state intervenes only upon the destitution and necessity of the child, and in all cases of controverted right to its custody its welfare is a matter of primary consideration.

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Questions in relation to the care and custody of minor children, by reason of their being neglected, or for other cause, whereby they are committed to industrial schools, or houses of refuge, or other like institutions, where the interference with parental custody is temporary merely, and which do not change the *status* or adjudicate finally upon the right of the parent to its custody, are materially different from the proceeding under consideration. In the case of *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 339, it was said that the statute in that case "operates, so to speak, upon the child *in personam*, without citing the parent or guardian by the proceeding or by the commitment. It appears to us quite obvious, upon familiar principles, that the parent or guardian is not precluded by the commitment from asserting any right to the custody and care of the child which he may afterwards be able to establish. . . . The commitment during minority binds the child only, not the parent or guardian, when competent to fulfil towards the child the duties assumed by the state." But the proceeding by adoption here in question is a mere statutory proceeding, not according to the course of the common law, and, when legally conducted, has a much broader scope, and utterly terminates all relations between the minor and his legitimate parents. "A child so adopted shall be deemed for the purposes of inheritance and succession by such child, *custody of the person and right of obedience* by such parents by adoption, *and all other legal consequences and incidents* of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents by adoption. . . . The natural parents of such child *shall be deprived by such order of adoption* of all legal rights whatsoever respecting such child, and such child shall be freed from all legal obligations of maintenance and obedience to such natural parents." R. S. sec. 4024. The statute (sec.

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4022) requires that such order shall be made upon petition, and shall not "be made without the written consent of the living parents of such child, unless the court shall find that one of the parents has abandoned the child, or gone to parts unknown, when such consent may be given by the parent, if any, having the care of the child. In case where neither of the parents is living, or if living *have abandoned* the child, such consent may be given by the guardian of such child, if any. If such child has no guardian, such consent may be given by any of the next of kin of such child, or, in the discretion of the court, by some suitable person to be appointed by the court." The order is required to recite the facts of the case, and to declare that from and after its date such child shall be deemed, to all intents and purposes, the child of the petitioners; and by such order the name of such child may be changed to that of such parents by adoption, and the statute gives the order the effect already stated.

The proceedings and order of adoption relied on by the defendant do not recite or show any consent of either the parents of the child, Mary Schiltz, or by any of her next of kin or her guardian, to such adoption, but of Jacob Imig, "duly appointed by the court for that purpose;" but the proceedings recite that the plaintiff *had abandoned her*, and that her mother was dead. There is nothing whatever to show that any notice was ever given to the plaintiff to appear and defend against the application or assert his natural rights, or that he appeared at the hearing, but the inference from the record is quite to the contrary. Although it is too well settled to admit of dispute that the father can recover for the loss of the services of his minor child, against any one causing such loss (*Rooney v. Milwaukee Chair Co.* 65 Wis. 397), the proceeding in question was held by the court conclusive evidence, by judicial decision, that he had abandoned his daughter Mary, and that by virtue

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of the alleged order of adoption he had been lawfully deprived of the right to her services, of all legal rights whatsoever respecting her, and that she was free from all natural filial relations to her father, although he had had no notice of the charge, or time and place of hearing, and no opportunity whatever to defend against it, and although he had been condemned without a hearing, and denied the charge of abandonment in his complaint in this action. The circuit court held the charge of abandonment conclusively established by the order of adoption, and dismissed his complaint.

The contention that the county court could, without notice to the plaintiff or opportunity to him to defend against the charge of abandonment, grant an order depriving the plaintiff of his most sacred natural rights in respect to his child, so jealously guarded and protected by the laws, offends against all our ideas respecting the administration of justice, and is opposed to the principles which lie at the foundation of all judicial systems not essentially despotic in their character and methods of procedure. It is provided by the fourteenth amendment to the constitution of the United States that "no state shall . . . deprive any person of life, liberty or property without due process of law." Due process of law, as applied to judicial proceedings, includes a charge before some judicial tribunal, and notice to the party in some form, either actual or constructive, and an opportunity to appear and produce evidence in his defense and be heard by himself or counsel. To proceed to adjudicate in the absence of notice to the party "would be contrary to the first principles of the social compact, and of the right of administration of justice." *Mc Veigh v. U. S.* 11 Wall. 267. In *Windsor v. Mc Veigh*, 93 U. S. 277, it is held that: "Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice,

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recognized as such by the common intelligence and conscience of all nations. A sentence of the court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to the party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction, in any case, to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter." These are familiar principles, existing before and secured by the fourteenth amendment, and they are sustained by a vast number of adjudicated cases and a wealth of argument and illustration with which it is not necessary to extend a judicial opinion. The cases all hold a consistent rule on this fundamental point. The paramount law of the land condemns the proceeding here in question, and it is impossible to justify or sustain it. We have not been referred to a single adjudicated case which holds that such an order as this is valid, as against the claim of the natural father to the services of his minor child, or as affording any evidence that he has abandoned it. Certainly, nothing is gained by saying that the proceeding is one *quasi in rem*, for, in all such, notice to the party to be affected and bound, either actual or constructive, is absolutely essential. Nor is it material that the order may be set aside on petition, appeal, or *certiorari*. The fact still remains that as to the father the order is a mere nullity and may be disregarded as such whenever and wherever it comes in question as against him or as affecting his rights. But the order in question may well be held valid as against the minor child, as in the case of the commitment to the Industrial School of Milwaukee. *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328. The judgments and decisions of a judicial tribunal are conclusive and secure against col-

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lateral attack only when the tribunal rendering them had jurisdiction of the subject matter and of the parties to be affected by them. By reason of the want of jurisdiction of the person of the plaintiff, the proceeding in question established nothing as against him, and is no evidence that he abandoned his child. That question remains open, therefore, for trial upon the issue tendered by the complaint. No other point was raised or discussed, and it follows that the judgment of the circuit court dismissing the plaintiff's complaint is erroneous, and must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

See note to this case in 21 L. R. A. 488.— REP.

STADLER, Respondent, vs. TREVER, Appellant.

September 8 — September 26, 1893.

Insurance: Contract by agent to place insurance: Consideration: Pleading.

In an action against an insurance agent for breach of a contract to place insurance on plaintiff's property, the complaint alleged, among other things, that, after a policy had been issued by defendant and the premium therefor been paid to him by plaintiff, the latter moved the insured property and told defendant he wished to have the insurance transferred; that defendant said he would change the policy, but afterwards told plaintiff he had canceled the policy and would issue a new one, that he had placed the insurance, that the unearned premium on the old policy would pay for a new one for the unexpired term, and that he would write the policy and send it to plaintiff. The complaint further alleged that defendant negligently omitted to have the property insured as he had agreed to do; but also alleged that the unearned premium was applied by him in payment of the premium on the policy which he promised to write. It did not allege that the original policy was ever canceled in fact, or that defendant had any unearned premium

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thereon in his hands, or that he would have been entitled to a commission on the new policy had he written it. *Held*, that the complaint was insufficient in that it did not show any consideration for defendant's alleged agreement, and because of the conflicting averment as to the application of the unearned premium.

APPEAL from the Circuit Court for *Langlade* County.

This action is to recover damages for the failure of defendant to place an insurance on plaintiff's property, as it is alleged he agreed to do, the property having been afterwards destroyed by fire.

It is alleged in the complaint that in November, 1891, defendant, who was an insurance agent at Antigo, issued to plaintiff the policy of a certain company therein named, insuring him against loss by fire on his household property and effects, in the sum of $300, for one year, for which plaintiff paid defendant a premium of $10. That in March, 1892, plaintiff's house took fire, but the fire was extinguished without loss. A few days later, defendant told plaintiff he thought some one was trying to burn him out, and advised him to remove to some other house; and two weeks later the plaintiff did so remove, taking the insured property with him. That thereafter he told defendant he desired to have his insurance transferred from the former to his latter residence, to cover the same property, and defendant told him to bring his policy and he would change it, and afterwards informed him that he had canceled the policy and would issue a new one; also, that he had placed the insurance, and the unearned premium on the policy would pay the premium on a new policy for the unexpired term of the original policy, and that he would write the policy and send it to plaintiff's house. The complaint then proceeds as follows:

"That plaintiff was led to believe, by the promises and assurances given him by the defendant, that his household furniture and personal effects, which had before that time

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been covered by insurance, were covered by insurance in a good company, as the defendant promised and agreed to do, and for which this plaintiff paid defendant. That the unearned premium on policy number 2,225,209, hereinbefore mentioned, was applied by the defendant in payment of the premium on the policy which defendant said and promised plaintiff to write, and it was distinctly understood and agreed by and between the parties hereto at that time, to wit, in March, 1892, that the above-named defendant would insure and secure a policy of insurance for this plaintiff, upon his household furniture and personal effects, in the sum of three hundred dollars, in a good, responsible fire insurance company, and that the unearned premium, as hereinbefore stated, would pay for the premium upon said policy to run until the 14th day of November, 1892, and that there would be no further charge or expense attached to the same. That plaintiff, relying upon the promises and assurances of defendant, and believing that his personal property, as hereinbefore stated, was covered by a policy of insurance issued by the defendant as he promised and agreed to do, paid no further attention to his insurance matter, and, as he had no other insurance upon said property, and having implicit faith and confidence in the honesty of this defendant, he paid no further attention to it, but believed in fact that the defendant had insured his property as aforesaid."

Loss by fire of the insured property, of the value of $300, May 14, 1892, without fault of plaintiff, and immediate notice thereof to defendant, and that defendant then informed plaintiff that he had not written the policy, and offered to refund the original premium paid by plaintiff, are alleged. It is further charged that "the defendant negligently and carelessly omitted to have the property of this plaintiff insured, as he agreed to do, and for which he was paid by this plaintiff, and has absolutely refused since the

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time of plaintiff's said loss to pay the same, and that in consequence of said fire, and the neglect and wilful misrepresentations of defendant, this plaintiff has sustained a loss of $300, being the amount which defendant said he would insure plaintiff's property for, and for which he was paid." Judgment for $300, interest, and costs is demanded.

Defendant appeals from an order overruling a general demurrer to the complaint.

For the appellant there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *C. B. Bird*. To the point that no agreement binding on defendant is shown because no consideration is shown, they cited Mechem, Agency, sec. 478; *Elsee v. Gotward*, 5 Term, 143; *Thorne v. Deas*, 4 Johns. 97.

For the respondent the cause was submitted on the brief of *Goldberg & Hoxie*.

LYON, C. J. The complaint, although signed by able counsel, is very carelessly and obscurely drawn. It contains extended statements of evidence as distinguished from facts, thrown confusedly together, and it omits direct statements of material allegations, which compels resort to doubtful inferences to supply them. Indeed, in some material particulars there is not sufficient averment to support even doubtful inferences. Although negligence and wilful misrepresentations are charged therein, the pleader evidently was trying to state a cause of action *ex contractu*, for some breach of a contract to place insurance on plaintiff's property. It is immaterial that defendant negligently omitted to place the insurance, or that he made the misrepresentations alleged. The omission is alleged as the breach of the contract, and averments of the reasons why it occurred are surplusage. The allegation that the misrepresentations by defendant were one of the causes of the

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damage to plaintiff is illogical and of no significance, because the fire alone caused such damage. If defendant entered into and failed to perform a valid contract with plaintiff to place insurance on the property burned, whether he so failed negligently or wilfully, or for any other reason not chargeable to plaintiff, he is liable to respond in damages for the breach of such contract; otherwise, not.

Did the complaint allege that the original policy issued to plaintiff was canceled; that the unearned premium was in the hands of defendant, who promised to write a new policy in some other company for which he was agent, and to apply such unearned premium in his hands in payment of the premium on such new policy; and that he failed to do so, retaining the unearned premium,—he would doubtless be liable for the damages to plaintiff caused by such breach of contract, the measure of which, in this case, would be the value of property which he agreed to insure, and which was afterwards burned. But there is no averment that the policy was ever canceled,—only a statement that defendant said it had been canceled. Without a cancellation of the policy, no unearned premium was due from the insurance company. Neither is it averred that the defendant had any such premium in his hands. Presumably, he had paid over the premium on the original policy to the insurance company entitled thereto. In that case he had no funds in his hands with which to pay the premium on the new policy, and his agreement to write a new policy (if he so agreed) was without consideration and not binding upon him. It is said that, had he written the new policy, he would have been entitled to a commission thereon, which is a sufficient consideration for his promise to write it. But it is not alleged that he would have been entitled to such commission. He may have been working for the company in which he would

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have written the policy for a salary, in which case his compensation might not have been affected by the writing, or failure to write, the new policy.

Moreover, there are conflicting averments in the complaint on a very material point. While we think that, considering the whole complaint, the breach of the contract assigned is the failure of the defendant to charge some insurance company with the risk on plaintiff's property, yet it is alleged therein that the unearned premium paid for the original policy "was applied by the defendant in payment of the premium on the policy which defendant said and promised plaintiff to write." If this allegation is true, probably the insurance company for whose benefit such premium was applied would be liable to plaintiff on its agreement by its agent to insure him. The plaintiff knew that the defendant was acting as agent of such company, and hence defendant could not be held liable on such agreement to insure. If plaintiff did not know the name of such company, he could have ascertained it by applying therefor to defendant, who no doubt would gladly have given the information, and thus have relieved himself from personal liability.

Even under the liberal rules which now prevail for the construction of pleadings, we fail to find in the complaint any certain, intelligible statement of facts constituting a cause of action, and are therefore impelled to the conclusion that the demurrer thereto should have been sustained.

By the Court.—The order is reversed, and the cause will be remanded to the circuit court with directions to sustain the demurrer.

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WALL, Appellant, vs. THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

September 8 — September 26, 1893.

Vendor and purchaser of land: Option to purchase: Oral modification: Part performance: Equity.

1. Where one having a written option for the purchase of land elects to purchase within the time prescribed, and enters upon the land and expends money thereon, he may enforce performance of the contract.
2. Although an oral modification of such contract is within the statute of frauds, yet where the purchaser, relying thereon, has expended large sums in improvements, the courts may compel specific performance of the contract as modified.

APPEAL from the Circuit Court for *Polk* County.

On May 4, 1886, the plaintiff and the Minneapolis, Sault Ste. Marie & Atlantic Railway Company entered into a written contract to the effect that in consideration of one dollar paid to the plaintiff by the said railway company, the receipt whereof was thereby acknowledged, the said plaintiff did thereby give and grant to said company the right to purchase within one year from the date named, if it should so elect, a strip of land 200 feet in width, therein described, and also another strip of land 125 feet in width, therein described, which last-named strip was composed of two strips, therein described. And said written agreement also contained the following, to wit:

"If this option is accepted by the said company within the time above limited, then I agree to convey to it in fee simple the above described strip of land, by good and sufficient deed, with full covenant of seizure and warranty, and discharged of all dower and right of dower and other incumbrances, for and in consideration of the sum of three hundred ($300.00) dollars, to be paid therefor by said company on delivery of such deed.

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"In consideration, as above expressed, I consent that said company and its officers, agents, contractors, and subcontractors, and its and their and each of their servants, may forthwith enter upon said strip of land above described, and do all and any acts necessary to the construction of a railroad upon the above described strip of land; and agree that, if this option be taken by said company, said deed of conveyance shall release all damages to any other premises by reason of the taking of the above strip of land and the construction thereon of a railroad by said company.

"Said company may, within the time for accepting this option above limited, institute appropriate proceedings to condemn the above described strip of land, and in such cases, but not otherwise, shall be deemed to have thereby and thenceforth waived the right to purchase the same at the price herein stated.

"Provided, however, and this contract is executed upon the express condition, that should said company elect to purchase the said belts or strips of land herein described in pursuance of this contract, *it shall preserve substantially as the same now exists the approach to the limekiln on said premises known as the 'Patent Limekiln,' and shall also construct on some feasible place on said premises a side track, to be used by me.*

"This agreement shall bind the heirs, successors, personal representatives, and assigns of the parties thereto.

"Dated this fourth day of May, 1886.

"In presence of SAMUEL his x mark WALL [Seal.]

"GEO. D. MCGILL,

"CHARLES H. OAKEY."

In January, 1887, in pursuance of the terms of said contract, the said railway company, by its contractors, entered upon said right of way designated in said contract, and commenced the construction of its road upon and along the same. On January 31, 1887, the said railway company

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entered into an oral agreement with the plaintiff, whereby the plaintiff agreed to permit said railway company to fill up and permanently obstruct the private wagon road leading from the highway to said limekiln, and to aid said company in securing a vacation of said public highway, in consideration of which the said company agreed to construct for the plaintiff, on his land, a new and different wagon road to said kiln, on a line then agreed upon between the parties, which line commenced at a point near where the said right of way crossed the south line of government lot 4, and on the northwesterly side of said railway track, and ran thence in a northeasterly direction near the northwesterly side of said right of way to said limekiln. By said agreement the parties intended to and did modify said written contract by substituting the agreement to construct said new road for the agreement to preserve the road leading from the highway to the limekiln heretofore mentioned; but in so far as the written agreement provided for preserving the track in use at the time of making said contract, leading from the vicinity of the limekiln to the top of said kiln, the same was not modified by said verbal agreement.

In pursuance of said contract as modified by said verbal agreement, the said railway company proceeded to build its railroad across said lands, and to fill up and permanently obstruct the old wagon road referred to in said written contract, and expended in such construction across said lands the sum of $25,000. Said railway company and the defendant have ever since been, and still are, in possession of said right of way, and the same constitutes a part of the main line of the defendant's road as now operated by it. During the construction of said road no objection was made by the plaintiff to the acts of the parties engaged in such construction, notwithstanding he had notice thereof, except that he objected to the filling up of the highway

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leading from the vicinity of said kiln to the top thereof, and objected to the workmen rolling down rock upon and around said kiln and upon and around buildings used in connection therewith. A large amount of rock was thrown down upon said kiln and around the same and said buildings by the workmen, whereby said kiln and buildings were considerably injured and rendered useless till such time as the debris was removed, and the kiln and buildings put in a state of repair, and the way reopened to the top of said kiln. While the work of constructing the road across said lands was progressing the plaintiff repeatedly protested against the acts of the contractors in throwing down rocks in the manner stated, but was each time told that the debris would be removed, and the kiln and buildings repaired, as soon as the roadbed in the vicinity thereof was constructed.

Within one year from the date of said written contract the said company duly declared its option to purchase the said right of way in pursuance of said written contract, and tendered to the plaintiff the sum of $300, and demanded of him a deed in pursuance of said written contract; but the plaintiff refused to receive said sum, or to comply with the terms of said contract, or to execute said conveyance. The company kept said tender good. The railway company graded said track, and notified the plaintiff that it was ready to perform said written contract as modified; but the plaintiff, without any justifiable excuse therefor, refused to permit said company to do the same. The only reason why the said work was not then done was because of the plaintiff's refusal to permit it to be done.

In September, 1889, the plaintiff filed in the office of the clerk of the circuit court a petition for condemnation proceedings under the statutes. Upon the hearing of said petition the defendant answered, claiming to be the equitable owner in possession, and entitled to a deed of said right of way, and asked that the said petition be dismissed,

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for the reason that its rights could not be adjudicated in such summary proceedings, whereupon it was stipulated by the parties thereto and hereto that said proceedings be stayed until this action could be brought and the rights of the parties hereto adjudicated, and an order to that effect was made accordingly. Thereupon the plaintiff commenced this action to set aside said written contract and said modification thereof, and to have the same declared null and void, and that all claim of the defendant to the possession or right, title, interest, equity, or lien in or upon said lands be forever absolutely determined; and alleging that the plaintiff was during all the time mentioned a married man, and living with his wife and family upon a portion of said lands as his homestead. On January 29, 1890, the defendant answered said complaint, alleging in effect the facts stated, and also denying that any portion of the plaintiff's homestead was included in said right of way, and also alleging the same as a counterclaim to said action, and praying judgment that the plaintiff be required to perform in all things the conditions of said written contract as so modified, and that he be required to execute and deliver to the defendant a deed of said right of way described therein, and that the plaintiff be required to specifically perform said contract so modified. The plaintiff replied to said counterclaim.

Upon the trial of the issues so formed it was in effect found, in addition to the facts stated, that upon the trial of this action the defendant in open court consented that the westerly line of its right of way at said limekiln should be located so as to leave said kiln intact, with a sufficient space upon and on the east side thereof to allow the plaintiff a driveway to the top of said kiln, and to use and operate the same; that such offer was substantially in accordance with said written contract; that said offer concedes to the plaintiff all that he would be entitled to under the

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most favorable construction of said contract, but that the court was unable from the evidence to determine, with sufficient definiteness to direct a conveyance of the right of way to the defendant, the line of said right of way as the same must be located in order to agree with said offer; that the evidence does not disclose any mistake of the parties in the location of the line of said right of way at the limekiln, but that it satisfactorily appears that it was understood by all the parties that said line was so located as to leave some portion of said limekiln in the defendant's right of way, and it was agreed that the said right of way should nevertheless not interfere with the maintenance and operation of said kiln as the same then existed, and the proviso to said contract was intended to secure to the plaintiff the right to so maintain and operate said kiln; that the evidence does not show that any part of said lot was included in the plaintiff's homestead at the time of making said contract.

From the facts so found the court concluded that the work required to be done under the proviso to said contract as modified was not a condition precedent to the right of the defendant to a deed to said right of way; that the acts of the plaintiff constituted a waiver of the conditions of said proviso, at least so far as the performance of such conditions would require a greater expenditure of money than would have been required if the plaintiff had permitted the work to be done when the railway company's contractors were on the ground; that the said oral agreement, so far as it modified the written contract, was a valid and binding agreement, and that the written contract as so modified was a valid, subsisting, and binding contract between the parties; and that the defendant, on doing what was therein equitably required of it, was entitled to have said contract specifically performed by the plaintiff.

Thereupon the said court referred said cause to a referee

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to ascertain certain matters therein mentioned, but, upon the report of the referee being made and filed, it satisfactorily appeared by an inspection thereof that said referee did not follow the order of reference, and that his findings were erroneous, and accordingly the findings of said referee were set aside and vacated. The parties hereto then submitted the questions referred to said referee to the court for determination upon the evidence taken before said referee and other evidence taken in court, and the court found, in addition to what had previously been found, as matters of fact, that the correct description of the westerly line of the right of way of the railway company at the limekiln, locating the same around and east of said kiln, so as to leave said kiln outside of said right of way, with a sufficient space around and upon the east side thereof to enable the plaintiff to use said space as a driveway to the top of said kiln, was and is as therein described, and traced with a red line upon the blue print attached to said findings. And it was ordered that the line of said railway company's right of way in the vicinity of said limekiln be established as above set forth. The court further found that it would have cost the company to have constructed the new road to the limekiln as mentioned, and to have restored said roadway, remove the rocks thrown down upon said kiln and the buildings in connection therewith and around said buildings and kiln, and to put said kiln and buildings in substantially as good state of repair as they were at the time of making said written contract, if the railway company had been permitted by the plaintiff to have done the work before defendant's contractors left the premises, the sum of $1,200; that the plaintiff was only equitably entitled to that sum from the defendant as a condition of the performance of said written contract as so modified; that the defendant was willing that said road should be constructed inside of its right of way from the crossing of the

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main track near the side track northeasterly for a distance of about 400 feet, passing off said right of way onto the plaintiff's land outside of said right of way, and that the road can there be constructed at much less expense than on a line wholly outside of said right of way, and that the said road so constructed inside said right of way for a distance of about 400 feet will fully satisfy said plaintiff's needs and comply with said agreement for said new road from the side track to the limekiln; that all equitable considerations demand that the new road be located on the line specified, requiring the least expense, and that the sum which the defendant should be required to pay as a condition of the plaintiff's performance of said contract should be limited to what it would have cost the railway company to have constructed said new road on said less expensive route; that if there was anything in the former findings therein in conflict with such determination, the same were thereby modified accordingly. And it was ordered that the findings theretofore filed, as modified and corrected by these findings and conclusions, should constitute the measure of the rights and liabilities of the parties herein.

On June 15, 1892, the defendant deposited with the clerk of the trial court the said sum of $1,200 for the use of the plaintiff, in accordance with the said findings of the court therein filed with said clerk, May 17, 1892. On November 22, 1892, it was ordered that the plaintiff be required within thirty days from and after the service of a copy of this order on him and his attorneys, to execute and deliver to the defendant a deed conveying to it the right of way for its railroad through the said lands of the plaintiff according to said contract, except that the description of the west line of said right of way at and in the vicinity of the plaintiff's limekiln mentioned, should be as described and as indicated by the said red line on the map constituting a part of the record. From the judgment entered accordingly the plaintiff appeals.

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For the appellant the cause was submitted on the brief of *Chas. H. Oakey* and *Searles & Gail.* They contended, *inter alia*, that the contract was a mere option, which conferred no interest either legal or equitable in the land. The right of purchase, to be made available, must have been exercised at or within the time specified in the agreement, and the conditions precedent, if any, must be faithfully observed. Equity cannot relieve from nonperformance of terms and conditions, however arbitrary, imposed on the right to exercise an option to purchase. *Lombard v. Sinai Congregation*, 64 Ill. 477; *Sutherland v. Parkins*, 75 id. 338; *Bostwick v. Hess*, 80 id. 138; *Longfellow v. Moore*, 102 id. 289; *Chappell v. McKnight*, 108 id. 570; 1 Warvelle, Vendors, 187.

For the respondent there was a brief by *H. B. Dike*, attorney, and *Alfred H. Bright*, of counsel, and oral argument by *Mr. Dike.*

CASSODAY, J. This case comes before us upon the pleadings and the findings and judgment of the court. These findings exclude from our consideration the contention apparently made in the trial court, to the effect that a part of the land covered by the contract was included in the plaintiff's homestead, and that, as the contract was not signed by the plaintiff's wife, it could not be enforced against the land.

The statute declares, in effect, that every contract for the sale of any lands, or any interest therein, shall be void unless the contract expressing the consideration be in writing, and be subscribed by the party by whom the sale is to be made. Sec. 2304, R. S. The mere fact that the contract in question was only signed by the vendor does not prevent its enforcement against him and the land. *Docter v. Hellberg*, 65 Wis. 415. There can be no question but what it sufficiently expresses the consideration. The contention is that the writing was a mere option, without

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mutuality, and gave the company no interest in the land. But one having an option in writing for the purchase of land has an interest therein, within the meaning of the section of the statute cited, as well as sec. 2302, R. S. *Telford v. Frost*, 76 Wis. 172. Where the option is exercised by electing to purchase within the time prescribed, and entering into the possession of the land and expending money thereon, there would seem to be no good reason why such contract should not be enforceable. *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526.

It is contended, in effect, that under the statute cited it was incompetent for the parties to modify the written contract by parol; and hence that the court improperly enforced such contract so modified; and in support of such contention counsel seem to rely on *Atlee v. Bartholomew*, 69 Wis. 43, and *Heisley v. Swanstrom*, 40 Minn. 196. These cases are in line with the general rule that under the statutes cited an agreement for the sale of land, wholly or in part oral, cannot of itself be enforced in equity. But the statute also provides, in effect, that nothing contained in those sections "shall be construed to abridge the powers of courts to compel the specific performance of agreements, in case of part performance of such agreements." Sec. 2305, R. S. This court has frequently held that the mere payment of a portion, or even the whole, of the purchase price, is not such part performance as to take the case out of the statutes. On the other hand, this court has frequently held that payment of any considerable part of the purchase price, and the vendee's entry into possession and making valuable improvements thereon, constitute such part performance of an oral agreement for the sale of land as will take the case out of the statute of frauds and justify the enforcement of specific performance. *McWhinne v. Martin*, 77 Wis. 182, and the numerous cases there cited by Mr. Justice TAYLOR. See, also, *Lanyon v.*

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Martin, L. R. 13 Ir. 297; *Brown v. Sutton*, 129 U. S. 238. So, where there has been such part performance by the vendee that it would operate as a fraud upon him to allow the vendor to repudiate the contract, the same will be enforced in equity. *Paine v. Wilcox*, 16 Wis. 202; *Martineau v. May*, 18 Wis. 54; *Seaman v. Aschermann*, 51 Wis. 678; *Cutler v. Babcock*, 81 Wis. 195. The underlying principle here applicable is well expressed by MITCHELL, J., in *Brown v. Hoag*, 35 Minn. 375, where it is said: "He (the appellant) invokes the rule that acts relied on as part performance must be referable to and done in pursuance of the contract, and seems to assume that this includes only acts which were *stipulated* to be done in the contract itself and as a part thereof. We do not understand this to be the law. While the phrase 'part performance' is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term 'part performance' falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement. The acts done must be related to and connected with the contract, and the defendant's performance of it. . . . But this change of situation is not confined to doing what the contract *stipulated*,—that is, 'part performance,' strictly so called."

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As indicated in the foregoing statement, the company entered into possession, and after the company declared its option to purchase under the contract, and the written contract was modified by parol, the said company, relying thereon, constructed its road across said land, and expended a very large amount of money in performance or pursuance of such contract so modified. The mere fact that the court did not compel the defendant to pay for injuries caused by the plaintiff's own conduct is no ground for reversal. Nor is the plaintiff aggrieved by the defendant's voluntary relinquishment of a portion of the land described in the original contract. The facts found by the court manifestly justify the decree entered.

By the Court.—The judgment of the circuit court is affirmed.

HOULTON, Appellant, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and another, Respondents.

September 9 — September 26, 1893.

Public lands: Pre-emption of land within limits of city: Judicial notice.

1. Judicial notice will be taken of the fact that lands sought to be acquired under the pre-emption laws of the United States were within the corporate limits of a city, and not subject to pre-emption, under sec. 2258, R. S. of U. S.
2. The act of Congress of March 3, 1877, providing that "the existence or incorporation of any town on the public lands of the United States shall not be held to exclude from pre-emption . . . a greater quantity than 2,560 acres of land," does not apply to a city laid out mostly on private lands but including some of the lands of the United States.

APPEAL from the Circuit Court for *Douglas* County.

The case is stated in the opinion. The plaintiff appeals from a judgment in favor of the defendants.

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For the appellant there was a brief by *J. M. Gilman* and *Loud & O'Brien*, and oral argument by *P. H. O'Brien*. They contended, *inter alia*, that the act of Congress of March 3, 1877, applies in all cases where more than 2,560 acres have been included within the limits of a town or city, whether such town or city exists or was incorporated upon the public lands of the United States, or upon private lands, the limits of which were made to embrace public lands of the United States. *Lewis v. Seattle*, 1 L. D. 497 (501), 8 Copp's Land Owner, 143; *Philipson's Case*, 3 L. D. 77; *Harper v. Grand Junction*, 16 id. 127; *Alger v. Hill*, 2 Wash. 344.

For the respondents there was a brief by *Thos. Wilson* and *S. L. Perrin;* for the respondent *Northern Pacific Railroad Company* there was a separate brief by *F. M. Dudley*, *J. B. McNamee*, and *Louis Hanitch;* and the cause was argued orally by *Mr. Wilson* and *Mr. McNamee.*

ORTON, J. The complaint in this action is based upon the following facts, briefly stated:

Lots 6 and 7, section 29, range 14 W., are a part of the public lands of the United States, vacant, unoccupied, and have never yet been offered for sale, and are situated within the town site and corporate limits of the city of Superior. On the 4th day of September, 1890, the plaintiff settled and improved said lots with a view and for the purpose of acquiring the same under the pre-emption laws of the United States, and was duly qualified by residence and citizenship and in all other respects, and complied with all the requirements of the pre-emption laws and the rules of the land department to entitle him to a pre-emption of the same. On the 8th day of November, 1890, he duly presented to the register and receiver of the land office of the United States for the district in which said lands are situated his declaratory statement in due form for the pre-emption of the same,

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and offered to pay the fees required therewith, and was ready to make his proofs and payment, and is still ready to do so, in order to acquire title to the same. But said register and receiver rejected the same, alleging that said lands were railroad lands and not subject to pre-emption for that reason. The plaintiff thereupon appealed from said decision to the commissioner of the general land office, and duly forwarded to him the papers in the case, but no action has been taken thereon. The defendant railroad companies claim said lots as a part of their grants by the United States for railroad purposes, and that they hold the same by patents from the United States. The plaintiff claims that said lands at the time were not subject to be thus granted by reason of a subsisting pre-emption right in one Heller Benild, who settled upon and improved the same for that purpose, and was then residing thereon, and had paid the fees and filed his declaratory statement, and that therefore said companies never acquired any right thereto. The plaintiff asks judgment that one of said companies holds said lands in trust for him, and that it convey and release to him the title it has by its grant and patent, and that the *Northern Pacific Railroad Company* be decreed to have no title thereto.

This is the substance of the complaint. The defendant companies each demurred to the complaint on the ground that it does not state facts which constitute a cause of action. The circuit court sustained said demurrers, and dismissed the complaint, and entered judgment in favor of the defendants for their costs and disbursements, and the plaintiff appeals from said judgment.

The circuit court correctly held that it could take judicial notice of the fact that said lands, at the time the plaintiff offered to file his declaratory statement for a pre-emption, were, and still are, within the corporate limits of the city of Superior, which city then existed as a duly in-

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corporated city under the laws of this state, and that, being so, said lands were not and are not subject to be taken under the pre-emption laws of the United States, by reason of sec. 2258, R. S. of U. S.

That being the only question considered and decided by the circuit court, and, if decided correctly, is fatal to the plaintiff's case, we shall consider that question only on this appeal. The following are the only two provisions of the laws of the United States applicable to the question. The above sec. 2258 is as follows: "The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit: . . . Second. Lands included within the limits of any incorporated town, or selected as the site of a city or town." The act of Congress of March 3, 1877 (19 Statutes at Large, 392), provides as follows: "That the existence or incorporation of any town on the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than twenty-five hundred and sixty acres of land, or the maximum area which may be entered as a town site under existing laws, unless the entire tract claimed or incorporated as such town site, including and in excess of the area above specified, be actually settled upon, inhabited, improved and used for business and municipal purposes." The question depends entirely on the construction of these two provisions, taken together.

The learned counsel of the appellant contends that Congress came to the relief of the settlers on the public lands within incorporated sites, and protected their rights of pre-emption on any lands in excess of 2,560 acres, and that said act of March 3, 1877, is applicable to all town sites in which there are any of the public lands of the United States, and therefore applicable to the town site of Superior City, and that the plaintiff's pre-emption is protected because it is on the lands in excess of the 2,560 acres. On the other hand,

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the learned counsel of the respondents contend that said act has no application to incorporated cities laid out on lands mainly of private ownership, and partly on the public lands of the United States, like Superior City, Minneapolis, or Omaha, and that in such cities all pre-emptions are prohibited by said sec. 2258. This last contention appears to us to be correct from the clear and obvious meaning of the act. The language, "the existence or incorporation of *any town on the public lands of the United States*, or entered as a town site," is a very clear limitation of the act to town sites or incorporated cities laid out *exclusively* on the public lands of the United States, according to the laws of the United States; and the act has no application to the city of Superior or that class of cities, laid out mostly on private lands, but which may include some of the lands of the United States. The section has application to public lands "*included within the limits* of any incorporated town," as the lands in question happen to be included in the city of Superior. But it is sufficient that the act of Congress has no application to lands so situated. This section was applied to prohibit pre-emptions in the city of Minneapolis in *Burfenning v. C., St. P., M. & O. R. Co.* 46 Minn. 20, and in the city of Omaha, in *Root v. Shields*, 1 Woolw. (U. S.), 340–346, by Mr. Justice MILLER. It is true this last act was not considered in those cases, but the language of that act is too clear for any such construction as is contended for. The demurrers were properly sustained.

By the Court.—The judgment of the circuit court is affirmed.

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JOHNSON, Respondent, vs. LAKE SUPERIOR TERMINAL & TRANSFER COMPANY, Appellant.

September 9 — September 26, 1893.

(1, 2) *Railroads: Injury to licensee on track: Duty to provide lookout, etc.: Contributory negligence: Court and jury.* (3) *New trial: Discretion.*

1. A railroad company which has licensed the use of its grounds and track by pedestrians for a way, is bound to provide for a careful lookout in the direction in which a train is moving, in places where people are liable or likely to be on the track, and to signal the approach of its cars to persons in positions of danger.
2. Whether the plaintiff in this case, who, as a licensee, was walking between the rails of defendant's track and was struck by a locomotive running backward in the same direction, was guilty of contributory negligence in not looking back oftener than he did, is *held*, upon the evidence, to have been a question for the jury.
3. Where there is evidence which tends to support the verdict, the granting or denying of a motion to set it aside as contrary to the evidence is a matter within the discretion of the trial court, and this court will not interfere unless such discretion has been abused or unless, as a matter of law, upon the entire case the verdict cannot be allowed to stand.

APPEAL from the Circuit Court for *Douglas* County.

The plaintiff brought his action against the defendant, a railroad corporation engaged in a general switching and transfer business at West Superior, to recover damages for injuries caused to the plaintiff by the alleged negligence of the defendant while the plaintiff was walking on its track, rendering the amputation of the plaintiff's left foot necessary; the specific charge of negligence being that while the plaintiff, as licensee, was walking on the track, an engine of the defendant backed down on him without giving him any warning, and that the persons in charge of the engine failed to keep a lookout for persons on the track, though said track was and had been used for a long time by pedes-

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trians in going to and returning from various points, and with the assent of the defendant. The jury found a special verdict to the effect that the people, for a considerable length of time prior to the accident, had been accustomed to travel on the defendant's tracks, between the rails, at the point in question, to the knowledge and with the acquiescence of the defendant in such use of its track by the public; that there was a want of ordinary care on the part of the defendant's servants in charge of the engine at the time the plaintiff was injured, which was the proximate cause of the injury; and that there was no want of ordinary care on the part of the plaintiff, contributing thereto,—and assessed the plaintiff's damages at $6,000, upon which he had judgment, from which the defendant appeals.

The principal contention of the defendant is that the circuit court erred in not directing the jury, as requested, to find that the proximate cause of the accident was the negligence of the plaintiff, and that the court erred in not granting a new trial. The evidence of negligence on the part of the defendant, in not keeping a lookout, and in not ringing a bell or signaling the approach of the engine, was such as to clearly require the submission of that question to the jury, and so, too, as to the question of license and acquiescence by the defendant in the passing and repassing of the public over and along the switch tracks in question, and showed that various parties, mainly laborers and members of their families, were accustomed to come upon these tracks at different points, and walk on and along the tracks to various other points,—so much so that upon the track near where the plaintiff was injured there was quite a path worn between the rails by pedestrians, and that the ground on either side was incumbered so that it was inconvenient to walk outside of the track in very many places.

The principal track extended northerly from Second

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street, along Tower Bay slip, across North First street, to the point where the plaintiff was injured, a distance of 1,050 feet, and from thence north to the smelting works, a further distance of more than 1,100 feet, and the track was open to full view from 150 feet south of where the injury occurred to the north end of it, and was without material grade, though there were a few buildings along the track in the neighborhood of the point where the injury occurred.

The plaintiff was a common laborer, familiar with the ground and location of the tracks, and familiar with the manner in which the premises, which were the private property of the defendant, were used. On the morning in question he went down Tower Bay slip, along the track, to a point where a boat was unloading, in quest of employment, but failed to get any. Then he went back upon the track, and was walking south on it towards the south end of the Adamant Works, when he met the defendant's train, consisting of a locomotive and tender and about six freight cars, passing on its way north, and he stepped off the track, and it passed him. Shortly after he stepped back upon the track, when he looked up towards the north, in the direction of the engine, and saw that it was about 300 feet from him, and apparently still going north, and thought it was going up to the smelting works, which is a considerable distance further to the north, or at the end of the track. He stepped back upon the track, and continued his journey towards the south. Near the point where he stood there was a switch and a side track 480 feet long. The plaintiff testified, in substance, that when he started to return south upon the track the train was about 300 feet north of him, and he thought it was still going further north; that he is not sure whether it was on the main switch track or side track; that the locomotive was at the south end, pushing it north, with its head in that direction, and its rear end towards him; that he looked to see if the engine had stopped

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when he stepped on the track to go south, and walked right down the middle of the track about 75 or 100 feet to where there was a small pile of lumber, when he looked around and saw the train was close upon him; that he then tried to jump off the track, but before he got his left foot over the wheels struck him, and cut his foot off; that he was going south, the same way the train was, with his back towards it; that he was expecting the train might come back, so he was listening to hear whether the bell rung or not, and that is the reason he knows it did not ring; that the switch engine had a tank on the back of it, and a footboard or place to stand, and a railing for men to take hold of. The engineer told him when the train stopped, about 142 feet south of where he was injured, that he did not see him.

The switchman having charge of the crew testified that he was standing on the footboard between the engine and the cars at the time, and did not see the plaintiff; that the engineer could not see a man on the track back of him, on account of the tank, the top of which is seven or eight feet from the ground, unless he was twenty-five feet away; that the train was not going more than three or four miles an hour at the time of the accident. Another of the crew testified that he did not see the plaintiff before he was hurt. This witness did not know whether the bell was rung or not, but the fireman testified that he rang the bell. There was nothing to obstruct the view from a point 140 feet south of where the plaintiff was injured to the north end of the tracks. No one saw the plaintiff until after he was hurt, and there was no lookout on the footboard of the tank. The switch to the side track is eighty-seven feet north of the place of the accident, and a little south of where the plaintiff testified he got on the track to walk south, and the engine was 300 feet north of there at the time, going, as he supposed, to the smelting works, near

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the north end of the track. But there was evidence tending to show that the engine did not go north of this switch, and the testimony of the plaintiff may properly justify the inference that the train came south at a much greater rate of speed than four miles an hour.

Exception was taken by defendant because the court instructed the jury that, "in backing the engine, it was the duty of the defendant's servants to keep a lookout in the direction the engine was moving, and use ordinary care to signal the approach of the engine to any person it had reason to expect might probably be walking on the track, and to be ready to give such signal as the necessity therefor should arise."

For the appellant there was a brief by *Butler & Vinje*, attorneys, and *Tilden R. Selmes*, of counsel, and oral argument by *Mr. Selmes*. They contended, *inter alia*, that the contributory negligence of the plaintiff was the proximate cause of the accident. A person walking upon a railroad track must take notice that trains are liable to be passing at any time, and if he has reason to expect a train it intensifies his negligence if he fails to look and listen. If he goes upon a track while used for switching purposes, he should exercise every precaution before going on the track and should continually look and listen while on the track. This being the rule where the track is on a public highway, giving the pedestrian equal rights with the railroad, how much more must it be so where the traveler is a mere licensee upon yard tracks used continually for switching purposes, and where the licensee assumes the risks incident to the business carried on and the manner in which it is conducted. *Richards v. C., St. P. & K. C. R. Co.* 81 Iowa, 426; *Olson v. C., M. & St. P. R. Co.* 81 Wis. 41; *Flynn v. Eastern R. of Minn.* 83 id. 238; *Schmolze v. C., M. & St. P. R. Co.* id. 659; *Graf v. C. & N. W. R. Co.* 94 Mich. 579; *Railroad Co. v. Houston*, 95 U. S. 697; *Maxey v. Mo. Pac.*

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R. Co. 113 Mo. 1; *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16; *Marland v. P. & L. E. R. Co.* 123 Pa. St. 487; *Moore v. P., W. & B. R. Co.* 108 id. 349; *Penn. R. Co. v. Bell*, 122 id. 58; *Taylor v. D. & H. Canal Co.* 113 id. 162; *Myers v. B. & O. R. Co.* 150 id. 386.

For the respondent there was a brief by *McHugh, Lyons & McIntosh*, attorneys, and *Spooner, Sanborn & Kerr*, of counsel, and oral argument by *A. L. Sanborn*. They argued, among other things, that defendant had notice that large numbers of people were in the habit of using this track as a pathway, and it was its duty to provide a careful lookout in the direction the train was moving. The train was being recklessly pushed down the track, at an unlawful rate of speed, without the bell being rung or the whistle blown, or any lookout of any kind observed. Under such circumstances the company was guilty of gross negligence. *Whalen v. C. & N. W. R. Co.* 75 Wis. 659; *Bohan v. M., L. S. & W. R. Co.* 58 id. 30; *Heddles v. C. & N. W. R. Co.* 74 id. 239; *S. C.* 77 id. 228; *Townley v. C., M. & St. P. R. Co.* 53 id. 634; *Butler v. M. & St. P. R. Co.* 28 id. 487; *Ewen v. C. & N. W. R. Co.* 38 id. 613; *Johnson v. C. & N. W. R. Co.* 56 id. 279; *Farley v. C., R. I. & P. R. Co.* 56 Iowa, 337; *Frick v. St. L., K. C. & N. R. Co.* 5 Mo. App. 435; *Cheney v. N. Y. C. & H. R. R. Co.* 16 Hun, 415; *Battishill v. Humphreys*, 64 Mich. 514. The plaintiff was a licensee and not a trespasser, and it was not unlawful for him to use the track as others had been accustomed to use it. *Whalen v. C. & N. W. R. Co.* 75 Wis. 645; *Davis v. C. & N. W. R. Co.* 58 id. 646; *Hooker v. C., M. & St. P. R. Co.* 76 id. 542; *Townley v. C., M. & St. P. R. Co.* 53 id. 636; *Delaney v. M. & St. P. R. Co.* 33 id. 67; *Ill. Cent. R. Co. v. Hammer*, 72 Ill. 347; *Murphy v. C., R. I. & P. R. Co.* 45 Iowa, 661; *S. C.* 38 id. 539; *Harty v. Cent. R. Co.* 42 N. Y. 468; *Brown v. H. & St. J. R. Co.* 50 Mo. 461; *Kansas P. R. Co. v. Pointer*, 9 Kan. 620; *S. C.* 14 id. 38; *Kay v. Penn.*

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R. Co. 65 Pa. St. 269; *Penn. R. Co. v. Lewis*, 79 id. 33; *Daley v. N. & W. R. Co.* 26 Conn. 591; *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1155.

PINNEY, J. 1. At the time the accident occurred the defendant was running its locomotive, attached to and drawing a train of five or six cars, rear end in front, so that the engineer and fireman were not able to keep a reasonably vigilant lookout along the track in the direction the train was moving,—a somewhat unusual method of operating the train, though quite common, perhaps, in switching yards,—and it afforded sufficient reason for keeping a lookout different from, and in addition to, that practiced by the engineer and fireman when the locomotive is run right end in front. The train was being operated over the private premises of the defendant, but by its license and acquiescence, quite clearly proved, the public were in the habit, to a very considerable extent, of passing and repassing over and along the track and between the rails at the point where the injury occurred. The company, by its license and acquiescence, had lost the right to treat persons so passing as trespassers, for whose safety it would be answerable only in case of gross negligence; and by repeated decisions in this state it is well settled that a railroad company must provide for a careful lookout in the direction in which the train is moving, in places where people are liable or likely to be on the track, and especially children. The rule exists in the case of adults as well as children, and the failure to keep such lookout is negligence, as a matter of law. The instruction excepted to was clearly justified by the evidence, which showed that practically no lookout was kept in the direction the train was moving, on account of the reversed position of the locomotive. After having licensed the use of its grounds by pedestrians for a way, the defendant was not entitled to ignore their actual or

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probable presence on the track, and operate its train accordingly. The changed condition growing out of the licensed use of its grounds and tracks devolved on it the duty of keeping a lookout and signaling the approach of its cars to persons in positions of danger. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 634; *Davis v. C. & N. W. R. Co.* 58 Wis. 653; *Whalen v. C. & N. W. R. Co.* 75 Wis. 659, 662. The pedestrian passing and repassing along a track under such circumstances, it must be admitted, occupies a dangerous position; but he has a right to assume that the company will discharge its duty arising out of the circumstances and the relation which the parties occupy towards each other, and that it will not, by its negligence, expose him to, or inflict on him, any injury.

2. The question whether a verdict should have been directed for the defendant on the ground that the plaintiff was guilty of contributory negligence as a matter of law, or whether, under the evidence, it was a question of fact for the jury, is one of more difficulty. Generally, what is and what is not negligence is a question for the jury. It is not a fact to be testified to of itself, but a deduction or inference from the facts and circumstances in evidence. When the standard of duty is a shifting one, a jury must determine what it is, as well as find whether it has been complied with. If unbiased men would differ as to the inferences to be drawn from the facts and circumstances, then these inferences cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout; and in all cases in which such inferences are in doubt, giving to the testimony the construction most favorable to the party charged therewith, the question of negligence is for the jury. *Valin v. M. & N. R. Co.* 82 Wis. 6; *Hill v. Fond du Lac*, 56 Wis. 242; *Nelson v. C., M. & St. P. R. Co.* 60 Wis. 323; *Langhoff v. M. & P. du C.*

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R. Co. 19 Wis. 496. And many other cases might be cited in this and other courts to the same effect. The proof of contributory negligence, in order to warrant an absolute direction to find for the defendant, must be clear and decisive,— not leaving room for impartial and unbiased minds to arrive at any other conclusion.

Applying these familiar principles to the facts in evidence, and giving the facts the construction most favorable to the plaintiff, as we are bound to do, it is clear, we think, that the question of contributory negligence in this case was not one of law for the court, but one of fact for the jury. It cannot be said that there was an entire absence of care and caution on the part of the plaintiff. He did exercise certain care and precaution. It is said that he did not look and listen, did not employ the evidence of his eyes as well as his ears, to avoid danger; and the absolute and rigid rule requiring a party about to cross or go upon the track to both look and listen in order to ascertain the presence or approach of a train is invoked. But the plaintiff knew by sight, and hearing as well, that the train was on the switch track, for he met it on its way north, and he supposed it was going up to the smelting works, quite a distance, at the end of the track. If it was not going at a greater rate than three or four miles an hour on its return south, can it be said, as a matter of law, that the plaintiff was guilty of negligence, in that he merely listened for the train, expecting it would return, and walked a distance of about ninety feet before he looked again, supposing and believing, as he says, that it was far up the track? When he last looked, he says it was at least 300 feet distant from him. Certainly, in walking south on the track, he could not be expected to keep his eyes constantly to the north, and upon the locomotive. To have done so might have exposed him to like injury in the opposite direction. The requirement to look and listen does not nec-

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essarily mean that a party thus circumstanced must look all the time at the locomotive in question. The degree of care demanded by the situation would not necessarily require this, nor do we understand that the rule goes to any such extent, or that after the party has discovered and located the train he shall do more than exercise that degree of care and caution fairly indicated by the situation. The question of negligence thus ceased to be an absolute, and became a relative, one, in this case; and so the question was necessarily one for the jury to say whether he looked often enough, under all the circumstances, as he had understood and had observed them. Assuming that the locomotive was 300 feet north of him when he started south down the track, and that he traveled at a fair walk for twenty or thirty seconds without looking again, and if the train had started south when he saw it, it would have to run 390 feet before it could overtake and strike him, or at the rate of about eight miles an hour,—a rate believed to be unusual in doing switching,—yet he was all the time exercising some care and caution, by constantly listening and expecting to hear its bell. Had he any right to expect that the defendant would employ so high and unusual a rate of speed, in view of existing circumstances?

The case is distinguishable from *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659, in that in that case the plaintiff exercised no care or caution whatever when he entered upon the track of the railway. The case of *Whalen v. C. & N. W. R. Co.* 75 Wis. 654, in which the question of the plaintiff's negligence was held to have been properly submitted to the jury, is in many respects similar to the present, but it was not decided in that case that if the plaintiff had been an adult the case ought not to have gone to the jury. Each case necessarily stands upon its own particular facts and circumstances, and the jury, who saw the plaintiff and heard his testimony and the testimony of other witnesses,

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were best able to determine the degree of diligence which ought to have been required of the plaintiff in the present case, as well as the proper inferences to be drawn from the testimony. The evidence of negligence on the part of the plaintiff was not clear and decisive, not leaving room for impartial and unbiased minds to come to any other conclusion. For these reasons, and under well-settled rules, we think the question of contributory negligence was one of fact and properly left to the jury.

3. But little need be said in respect to the refusal of the court to set aside the verdict of the jury as being contrary to evidence. The granting or refusal to grant such a motion, where there is evidence which tends to support the verdict, as in this case, is a matter resting in the sound discretion of the trial court; and we cannot interfere unless such discretion has been abused, or where, as a matter of law, upon the entire case the verdict cannot be allowed to stand. In view of the fact that the trial court had advantages of judging whether, upon the whole case, justice had been done, which this court does not possess, the case which would induce this court to interfere with the decision of the circuit court overruling a motion for a new trial, resting in discretion, must be of a strong and exceptional character. The evidence does not furnish such a case.

It follows from these views that the judgment of the circuit court is correct and must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

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STAHL, Appellant, vs. LYNN and others, Respondents.

September 9 — September 26, 1893.

Deed: Relation to date of contract: Replevin.

A deed will not relate back to the date of a contract for the sale of the land so as to prevent the vendor, who retained possession until delivery of the deed, from maintaining replevin against a mere trespasser who wrongfully cut and removed timber from the land after the date of the contract but before the consideration was paid or the deed delivered.

APPEAL from the Circuit Court for *Douglas* County.

The action is replevin for 100 cords of cedar timber alleged to have been cut upon plaintiff's land by the defendant *Lynn*, and to be in the possession of the other defendants under a sale thereof by *Lynn* to some of them. The defendants gave the required undertaking, and obtained possession of the timber from the sheriff. The complaint is in the usual form of complaints in such actions. The defendant *Lynn* answered a general denial. He also interposed an affidavit to the effect that, if taken at all, the timber was taken by mistake, and offered plaintiff a judgment for $30 and costs. The offer was not accepted. No other defendant answered in the action. The proofs are that *Lynn* cut and removed the timber in question between March 27 and April 5, 1890, without any right to do so. On March 26, 1890, the legal title to and possession of the land from which the timber was cut and taken was in the plaintiff. On that day he gave one Peltier a contract to convey the land to him, the terms of which do not appear. Nothing was paid on that contract by Peltier until May 5, 1890, when he paid the consideration called for by it, and plaintiff delivered to him a conveyance of the land, dated March 26, 1890. *Lynn* does not claim under either plaintiff or Peltier, but was a naked trespasser in cutting and

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removing the timber. The jury found specially that the cutting was by mistake, and that the true market value of the timber at the time of such cutting was $51.

On the evidence and verdict, the court gave judgment for defendants. The plaintiff appeals from the judgment.

For the appellant there was a brief by *Reed, Grace, Rock & Reed*, and oral argument by *H. H. Grace.*

For the respondents there was a brief by *Murphy & Bundy*, and oral argument by *R. E. Bundy.*

LYON, C. J. This cause was here on a former appeal from a judgment for defendants, and such judgment was reversed for error and a new trial awarded. 81 Wis. 668. Another trial has been had with the same result. Both judgments went upon the ground that plaintiff was not the owner of the land when the trespass was committed; that is to say, the trial court applied the doctrine of relation, and held that the conveyance to Peltier, although it was not delivered and no consideration was paid therefor until May 5, 1890, took effect when delivered as a conveyance executed March 26th preceding, that being the date of the contract to convey the land, and hence that Peltier alone could maintain the action. Was the doctrine of relation properly applied to this case? The question was not determined on the former appeal, but it is the controlling question on the present appeal.

In *Gibson v. Chouteau*, 13 Wall. 92, the supreme court of the United States said of a similar ruling: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law, adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that instituted proceedings for the land and acquired the equitable claim or right to the title." Page 101. We understand this to be a correct statement of the law

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of relation, and it excludes the present defendants from its benefits, because they are not in privity either with the plaintiff or Peltier; hence, as to the defendants, when the timber was cut, the plaintiff was the legal owner and in possession of the land from which it was wrongfully taken, and may maintain trespass or replevin therefor against the wrong-doer.

It should be further observed that the record does not disclose the contents and terms of the contract of March 26th between plaintiff and Peltier. It may have been a mere option, and, if so, no one will contend that it affords any basis for a claim that the doctrine of relation ought to be applied, even as between the parties to it. But we do not rest our judgment on this ground.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded with directions to that court to assess the value of the cedar timber at $51, and to render the proper judgment for plaintiff.

HART, Appellant, vs. THE CITIZENS' INSURANCE COMPANY OF PITTSBURG, PENNSYLVANIA, Respondent.

September 9 — September 26, 1893.

Insurance against fire: Limitation of action on policy.

1. Where an insurance policy provides that no action thereon for the recovery of any claim shall be sustained "unless commenced within twelve months next after the *fire*," the time limited begins to run from the date of the fire, and not from the time when the liability is fixed and the right of action accrues.
2. Such a provision is not within the meaning of sec. 1975, R. S., which forbids the insertion in any policy of any provision "that no action or suit shall be brought thereon."

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APPEAL from the Circuit Court for *Douglas* County.

Action upon a policy of insurance against fire. The facts are stated in the opinion. The plaintiff appeals from a judgment in favor of the defendant.

For the appellant there was a brief by *Reed, Grace, Rock & Reed*, and oral argument by *H. H. Grace.*

J. B. Douglas, for the respondent.

WINSLOW, J. The action is upon a policy of insurance issued by defendant, November 11, 1890, upon plaintiff's dwelling-house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly fourteen months after the fire.

The policy contained provisions requiring immediate notice of loss, proofs within sixty days after the fire, examination of the assured under oath if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held by the circuit court that the action was barred because not commenced within twelve months next after the date of the fire, and plaintiff appeals.

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It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression "twelve months after the fire" means what it says, or something else. It is to be noticed that the parties here have not used the expression "after the loss occurs." Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established and the right to bring an action exists. The decisions in favor of this doctrine are numerous. *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315; *Spare v. Home Mut. Ins. Co.* 17 Fed. Rep. 568; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Barber v. Fire & M. Ins. Co.* 16 W. Va. 658.

There are, however, many decisions to the contrary: *Chambers v. Atlas Ins. Co.* 51 Conn. 17; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92; *Fullam v. New York Union Ins. Co.* 7 Gray, 61; *Glass v. Walker*, 66 Mo. 32; *Bradley v. Phœnix Ins. Co.* 28 Mo. App. 7; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co.* 12 Ont. App. 418; *Blair v. Sovereign Ins. Co.* 19 N. S. 372; *Travelers' Ins. Co. v. California Ins. Co.* 1 N. Dak. 151; *Schroeder v. Keystone Ins. Co.* 2 Phila. 286.

Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the

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affirmative view of the proposition in *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, and *Black v. Winneshiek Ins. Co.* 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel.

Doubtless the tendency of so many courts to construe the term "loss" as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed and an action accrues to the insured: *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Hong Sling v. Royal Ins. Co.* 7 Utah, 441; *Case v. Sun Ins. Co.* 83 Cal. 473.

On the other hand, the following cases hold that the limitation begins to run from the date of the fire: *Steel v. Phenix Ins. Co.* 47 Fed. Rep. 863; *State Ins. Co. v. Meesman*, 2 Wash. 459; *McElroy v. Continental Ins. Co.* 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *King v. Watertown Ins. Co.* 47 Hun, 1.

It is noticeable that all of the three cases above cited which hold that "fire" means the time when liability is fixed rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of *Case v. Sun Ins. Co.* 83 Cal. 473, the facts

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were that the insured was compelled to submit to examination by the company, and to produce books, bills, and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than thirteen months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation. See, to this effect, *Thompson v. Phenix Ins. Co.* 136 U. S. 287. The cases of *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352, and *Hong Sling v. Royal Ins. Co.* 7 Utah, 441, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until sixty days after the amount is fixed, it may happen that more than twelve months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say.

We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words which can have but one meaning are not subject

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to construction. "Twelve months next after the fire" has one certain meaning and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, *Black v. Winneshiek Ins. Co.* 31 Wis. 74, and *Thompson v. Phenix Ins. Co.* 136 U. S. 287; but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do anything. He had nearly ten months in which to bring his suit. By failing to do so he must be held to be barred by his contract.

The provision of sec. 1975, R. S., to the effect that no insurance policy shall contain a provision that no action or suit shall be brought thereon, is not applicable, because the clause under consideration is plainly not such a provision.

By the Court.— Judgment affirmed.

CORBETT, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

September 11 — September 26, 1893.

Carriers: Injury to horses through delay in unloading.

Where a railroad company, through its freight agent, contracted to carry horses to a point a few miles distant and to unload them the same evening, it is liable for damages resulting from its failure so to unload them, although the conductor of the train on which they were shipped told the shipper, a few minutes before the train started, that he did not think they could be unloaded that night.

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APPEAL from the Circuit Court for *Douglas* County.

The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by *Catlin & Butler* and *Carl C. Pope*, attorneys, and *Thomas Wilson* and *S. L. Perrin*, of counsel, and oral argument by *Mr. Pope*.

Alexander Athey, for the respondent.

ORTON, J. The plaintiff substantially alleges in his complaint that the defendant company, on the 5th day of April, 1892, received at Duluth, Minn., sixteen head of draft horses, of the value of $3,500, to be safely and securely conveyed on its cars from Duluth, Minn., to West Superior in this state, and to be delivered to the plaintiff at that place on that same day, to wit, the 5th day of April, 1892, for certain reward to be paid therefor. The defendant company did not safely carry and take care of said horses and deliver the same to the plaintiff at West Superior on that day, and did not deliver the same until the next day, the 6th day of April, whereby the said horses were exposed to inclement weather, and received bruises and wounds, and were greatly injured; and in consequence of the defendant's misconduct the plaintiff was obliged to incur expense in doctoring and caring for the same, to wit, the sum of $30, and has been deprived of their use for thirty days, to his damage of $200, and two of said horses were damaged and permanently injured, to his damage in the sum of $500.

With the general denial, the defendant company answered that it commenced the transportation of the horses on that day, late in the evening, and the defendant's agents informed the plaintiff that said horses would have to remain in the car all night, and could not be unloaded therefrom until the next morning, and that the plaintiff consented and agreed to the said terms and that the said horses should remain in said car over night at West Superior.

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The plaintiff, as a witness in his own behalf, testified as follows: On the 5th day of April, 1892, about 4 o'clock P. M., he called upon the freight agent of the defendant at Duluth, at the depot, and told him about trying to get the Northern Pacific Railroad Company to ship said horses to West Superior that day, and unload them there that night, and that company could not ship them that day; and the said agent told him to bring on his stock; they would ship them and unload them if the horses were loaded by 6 o'clock; and they were loaded before that time. The bargain was that they should be unloaded that night. About two minutes before the train started, the conductor told him, "See here! I don't *think* your stock can be unloaded on the other side to-night;" and the plaintiff said, "This is a nice time of day to tell me now." The plaintiff went on the same train with the stock. When the conductor told him he could not unload the horses that night, the car containing the horses was hitched on the train, and the engine attached to the train ready to pull out, and did pull out right away. One Fred. Bitney testified that the plaintiff said to the conductor, if he had known that the horses could not be unloaded that night he would not have loaded them, and the conductor said that "the agent ought to have told you so." The plaintiff testified, further, that he went to the freight office at West Superior about 8 o'clock in the evening of that day, and demanded his stock, and offered to pay the freight. The agent refused the freight, and told him that he could not place the stock that night, on account of there being no switch engine. The stock at that time was out on Hammond avenue, between two bodies of water, and they remained there until about half-past 8 o'clock the next morning, and were unloaded and delivered about 9 o'clock. The plaintiff then testified about the injury and damage to the horses from being left out all night in such a place, and the cost of doctoring them,

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and about his loss and damages on account of the injury to the stock, and introduced other testimony on that subject.

The defendant introduced as a witness S. A. Kemp, the freight agent at Duluth, who testified substantially that he told the plaintiff he could not give him a car to West Superior that night, because there were no arrangements for unloading them there at that hour of the night. The plaintiff insisted upon the company's taking the stock, and he then told him he would telegraph and ascertain. He did telegraph, and received a reply that the stock could not be unloaded there. On receiving this reply, about 6 o'clock in the evening, he was not present and knew nothing more about it. The plaintiff loaded the stock without his orders. It was customary for the owner to load the stock when the car was in place. He did not know certainly that the car could not be unloaded that night. He did not offer to unload the stock at Duluth after the receipt of the telegram. A. Conway, a witness for the defendant, testified that he told the plaintiff about seven or eight minutes before the train started that the stock could not be unloaded that night. He knew the time the plaintiff received his shipping bill. F. E. Williams, the freight agent at West Superior, testified that he replied to the telegram that the horses could not be unloaded that night, and he *thought* they could not be for the reason that they had no crew there. He sent the telegram about 6 o'clock. The train arrived at West Superior about 7 o'clock in the evening. The next morning, about 7 or 8 o'clock, the first thing the engine did was to go up and get the car and bring it down, and it was unloaded.

The plaintiff, recalled, testified that Kemp never told him the car could not be unloaded that night, or that he would telegraph to find out. The first time any one said it could not be unloaded that night was the conductor and

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the yardmaster, and that was just as the train was starting.

On this evidence and the instructions of the court, the jury found a verdict for the plaintiff of $500.

The above is substantially all the testimony material to the case, except that to prove the damages.

The case is almost exclusively one of fact. The law of the case is too plain for argument.

Whether there was a contract entered into, and what it was, depends upon the testimony of the plaintiff and Kemp, the freight agent, alone, and on these questions there is a conflict and direct contradiction. In such a case the jury had the right to believe one or the other. The question of the credibility of the witnesses is peculiarly within the province of the jury. According to the testimony of the plaintiff, he contracted with Kemp, the freight agent, that the defendant should transport his sixteen head of horses in its cars to West Superior in the evening of the 5th day of April, 1892, and deliver them to him that night at their destination. This was at about 4 or 5 o'clock, and the train was to leave at 6 o'clock that evening. He hurried to find a car and load the horses in it, and the car was at once placed in the train, and the train was hauled up ready for a start, and he had received his freight bill for the horses to be so carried. Only two or three minutes before the train started the conductor told him that they could not unload the horses that night, and he said, "This is a nice time to tell me now," and the train went on its way and the plaintiff with it. When the train arrived at West Superior, about 7 or 8 o'clock in the evening, it passed directly by the freight depot, and the car was left a considerable distance away, between two bodies of water, until the next morning about 8 o'clock. The plaintiff, after the train arrived at West Superior, went to the freight office, demanded his horses, and tendered the freight. His horses

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were greatly injured by standing in the car where it was left all night, in inclement weather.

This is the plaintiff's case. The testimony for the defendant conflicts with this case only in two particulars: (1) That of Kemp, that no such contract was made about unloading the horses that night, and that he said he would telegraph to ascertain, etc.; (2) other witnesses testified that it was seven or eight minutes, instead of two or three, before the train started that the plaintiff was informed that the horses could not be unloaded at West Superior that night, which is certainly quite immaterial. According to the plaintiff's testimony, there was a perfect contract to deliver the horses that night. On that contract they were loaded on the car, and the car placed in the train, and billed by the freight agent, and the train was ready to start when he received the casual information that they would not be unloaded that night, and he paid no attention to it, and the train went on. Does this last fact change or affect the contract? It does not appear that the conductor or yardmaster had any authority to change the contract made with the freight agent. The plaintiff depended upon his contract, as he had the right to do. These persons did not pretend to know that the horses could not be unloaded that night, and there was no evidence whatever that they could not have been unloaded that night as well as the next morning. There is no evidence that it was impossible. It was clearly a mere matter of convenience. To allow such testimony to change or vary a perfect and valid contract, on which the very safety and security of this live freight depended, would be trifling. The plaintiff well said that he would not have shipped the horses if he had known they could not be unloaded that night. He did not know that they could not be so unloaded, and never knew it. The *pretext* that the defendant company, with all of its men, machinery, and vast railroad facilities at West Supe-

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rior, could not unload sixteen valuable horses from a freight car, on their arrival, and was compelled by invincible necessity to leave the car with its perishable freight in a distant, dangerous, and inaccessible place, exposed to wind and weather, at an inclement season of the year, through the whole night, was not sustained by any proof whatever, and it would require a large amount of the most reliable evidence to make it credible.

There was really no defense whatever to the case made by the plaintiff's testimony. The case is a perfect one of a valid contract and its violation by the defendant to the damage of the plaintiff, and there is not a place in it for difficult or complicated questions of law on the rescission of contracts or on contracts of impossible performance. The case is too plain for argument or the citation of authorities.

There are exceptions to a large part of the charge of the court by the defendant's counsel. The instructions appear to be very full and fair, and to state the law of the case correctly. The court, in effect, instructed the jury that if they believed the witness Kemp, and not the plaintiff, the defendant was entitled to a verdict; but if they believed the plaintiff, and not the witness Kemp, the plaintiff ought to recover. There was perhaps too much said about the plaintiff taking his horses out of the car when informed that they could not be unloaded that night. He was not bound to unload his horses by any such casual talk of the conductor. The conductor did not pretend to *know* that they could not be unloaded that night. It was mere hearsay by telegraph, and the freight agent at West Superior said only that he "*thought*" they could not be unloaded, because there was no crew there. It needed no "crew" to unload the horses. If the car had been stopped or left in a proper place, the plaintiff could have unloaded them as he loaded them on the car himself. It was the

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duty of the company to provide the means for unloading the horses at the proper time and place, rather than expose such freight to destruction or great injury by its inexcusable negligence.

The learned counsel of the appellant do not point out the particulars in which the damages are excessive, and they do not appear to be so, but warranted by the evidence.

The verdict appears to be just, and supported by the evidence, and there is no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

SPAULDING LUMBER COMPANY, Respondent, vs. STOUT and another, Appellants.

September 11 — September 26, 1893.

Sale of chattels: Modification of contract: Agency: Ratification.

Purchasers of cedar posts are *held* to have been bound by a modification of the original contract of purchase, made on their behalf by an agent having general authority to purchase posts for them, it appearing that such modification was necessary in order to obtain more than a small quantity of posts, and that the report of the purchasers' inspector, accepted and acted upon by them, was entirely inconsistent with the theory that the original, and not the modified, contract was in force.

APPEAL from the Circuit Court for *Winnebago* County.

The plaintiff is a corporation of the state of Michigan, and a dealer in lumber and timber at Cedar River and Spaulding in that state. The defendants are partners, doing business in Lincoln, Neb. This action is to recover the contract price of forty-nine car loads of cedar paving posts shipped by plaintiff to defendants, and received by the latter at Lincoln.

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In August, 1888, the parties entered into a contract whereby it was agreed that plaintiff should ship to defendants at Lincoln from five to ten car loads of cedar paving posts, to be there inspected by defendants, and if they proved satisfactory the defendants agreed to take of plaintiff forty car loads of such posts. The price agreed upon was thirty cents for each post six inches in diameter and eight feet long, and in that proportion for posts of greater or less length and diameter, according to a well-established trade schedule of relative prices therefor upon the basis of thirty cents each for six-inch by eight feet posts.

The plaintiff alleges, and gave testimony tending to prove, that in September following, and after several car loads of posts had been shipped to defendants under such contract, the parties modified the contract, and agreed upon the price for the posts, to be delivered on the cars at Spaulding, as well for those which had already been shipped as those which should thereafter be shipped. Such new agreement fixed the price at the place of shipment, to wit, at Spaulding, Mich., net on board the cars, of all five-inch posts eight feet long and over, at fifteen cents each, and also for sizes of less length or diameter, as follows: four inches by seven feet, seven and one-half cents each; four inches by eight feet, eight and one-half cents; five inches by seven feet, twelve and one-half cents,— the inspection to be made at Lincoln. Also that defendants caused the posts to be inspected at Lincoln, and furnished the plaintiff with a statement of the result of such inspection.

The cause was referred to a referee to hear, try, and determine the same. It was tried before such referee, who found that the contract was modified as claimed by the plaintiff, and that the defendants had the posts inspected at Lincoln and furnished the plaintiff the report of such inspection. The referee adjusted the account between the parties on the basis of the modified contract and such in-

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spection report, finding that the report was correct, and found that the defendants were indebted to the plaintiff for the contract price of the posts thus shipped to them (rejecting culls), and for interest on such price, $4,007.41. The circuit court confirmed the report of the referee, and gave judgment for plaintiff for the amount thus found to be due it from the defendants.

The defendants appeal from the judgment.

For the appellant *Buckstaff* there was a brief by *Finch & Barber*, and oral argument by *Henry Barber*.

For the respondent there was a brief by *Thompsons, Harshaw & Davidson*, and oral argument by *A. E. Thompson*.

LYON, C. J. The testimony in the case is voluminous and conflicting. There is no controversy concerning the terms of the original contract entered into by the parties in August, 1888. The principal controversy is upon the questions of the making of the alleged modified contract of September, 1888, and the accuracy of the alleged inspection report of the posts at Lincoln, which are the basis of the judgment. We can make no extended statement or enter into any extended discussion of the testimony. It must suffice to say that the testimony has been sufficiently examined, and we are satisfied from such examination that the findings of the referee are supported by a preponderance of the testimony, and were properly confirmed by the court if the defendants are bound by the modified contract.

One Hoile acted as agent for defendants in making the modified contract. His authority to do so and to bind the defendants thereby is denied. It quite satisfactorily appears that he was the general agent of defendants to purchase paving posts in northern Michigan, and that it was necessary thus to modify the contract in order to obtain

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from plaintiff more than about thirteen car loads of posts. But in addition to this, and as tending to prove that the defendants accepted and adopted the modified contract, it appears that the inspection report made by their chosen inspector, and accepted and acted upon by them, made no discrimination of posts of greater diameter and length than five inches and eight feet, but massed or aggregated all such under one head. It also classified all the remainder of the posts under the three other specific heads of the modified contract, to wit: four inches by eight feet; four inches by seven feet; and five inches by seven feet. All this is entirely inconsistent with the theory that the original, and not the modified, contract was being acted upon by defendants. The inspection report furnishes no adequate basis for ascertaining the price of the posts under the original contract. We have no difficulty in holding defendants bound by the modified contract.

The judgment of the circuit court is fully supported by the findings of the referee. Those findings being upheld, the judgment cannot be disturbed.

By the Court.— Judgment affirmed.

OSBORNE, Appellant, vs. GORDON, Respondent.

September 12 — September 26, 1893.

Trusts and trustees: Wills: Discretionary power: Execution by successor of original trustee.

A will gave a fund to a trustee, directing that the interest and income arising therefrom should be paid over to the daughter of the testatrix, and authorizing said trustee to pay over to her "any portion of the principal of said trust fund, as it shall seem to him proper, for her support and comfort." *Held*, that the trust power in respect to payment of the principal was imperative and, upon the death of the original trustee, might be executed by a trustee appointed by the court.

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APPEAL from the Circuit Court for *La Crosse* County.

The facts are stated in the opinion. *Rockwell E. Osborne*, a trustee appointed by the county court of La Crosse county to execute a trust created by the will of Harriet A. Wells, deceased, appeals from the judgment of the circuit court reversing the judgment of said county court allowing a certain item in his account as such trustee.

For the appellant there was a brief by *Winter, Esch & Winter*, and oral argument by *Frank Winter*. They argued, among other things, that under sec. 4027, R. S. (providing that "the estate so given shall vest in like manner, *to all intents and purposes*, as it vested in the original trustee"), a trustee appointed by the court has the same powers, discretionary as well as ministerial, as the trustee appointed by the will. Gary, Probate Law, sec. 730; Perry, Trusts, sec. 503; *Leggett v Hunter*, 19 N. Y. 445.

George H. Gordon, guardian *ad litem* and respondent, contended, *inter alia*, that this is a case of a trust with a power annexed. The trust as to the "interest and income" is absolute, but the language employed in reference to the principal of the fund creates a *mere power*. Perry, Trusts (3d ed.), secs. 20, 114, 248, 253, 505–508; Story, Eq. Jur. sec. 1070; Pomeroy, Eq. Jur. secs. 834–1002; *Tainter v. Clark*, 13 Met. 220–225; *Bain v. Matteson*, 54 N. Y. 663–667; Sugden, Powers, sec. 183; *Lines v. Darden*, 5 Fla. 51; *Greenough v. Welles*, 10 Cush. 576; *Eldredge v. Heard*, 106 Mass. 582; *Cole v. Wade*, 16 Ves. Jr. 27. Sec. 4027, R. S., simply confers upon the probate court the same power and jurisdiction which courts of equity always possessed in cases involving testamentary trusts.

ORTON, J. The facts of this case are as follows:

Harriet A. Wells died *testate* at the city of La Crosse on the 12th day of May, 1889. The following are the provisions of her will, material to this case:

"All the rest, residue, and remainder of my estate, both

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real and personal, I hereby give, devise, and bequeath to my said executor, to sell, dispose of, and convert into money, either at private sale or public auction, on such terms as to him shall seem just and reasonable, and to divide the proceeds into three equal parts, one part of which shall be paid to my said daughter Rebecca S. Thompson, to have and to hold, to her, her heirs and assigns, forever. One part shall be paid to my said son, Helmus, to have and to hold, to him and his heirs and assigns, forever. The other part or third shall be paid to my son, Helmus M. Wells, to be held by him, however, in trust, for the following purposes: The interest and income arising from this part of my estate, so held in trust, shall be paid over by the said trustee to my daughter Eva M. Odell from time to time, as it shall be received, during her natural life; and I hereby authorize the said trustee to pay over to my daughter Eva any portion of the principal of said trust fund, as it shall seem to him proper, for her support and comfort. And in case my said daughter shall die leaving issue, so much of said trust fund as shall remain shall be paid over to her children, to hold to them and their heirs forever; but in case my said daughter shall die childless, then said trust fund so remaining, if any, shall be paid over to my said daughter Rebecca and to my son Helmus, to each an equal part, to hold to them and their heirs forever."

This is all of the will that can aid us in the construction of the clause in question. Helmus M. Wells qualified as executor, and accepted the trust, and paid over to the said Eva M. Odell only $209.40 before his death, on the 20th day of January, 1890. At that time the estate had not been assigned. On the 2d day of April, 1890, the said Rebecca S. Thompson was appointed administratrix *de bonis non* of the estate of Harriet A. Wells; and on the 7th day of May, 1890, Louisa M. Wells was appointed administratrix of the estate of Helmus M. Wells, and transferred the estate of Harriet A. Wells to said administratrix *de bonis*

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non May 20, 1890. On the 11th day of October, 1890, *Rockwell E. Osborne*, the appellant, on the petition of Eva M. Odell, was duly appointed trustee in the place of said Helmus M. Wells, deceased, to carry out the trust created by the will, and he was to have like powers and duties as the original trustee, and there was paid to him by the administratrix the sum of $7,997.01 of the trust fund. On the 7th day of February, 1891, the appellant, as such trustee, paid to said Eva M. Odell, the beneficiary, the sum of $1,000 of the principal of said trust fund, which seemed to him proper for her comfort and support. The appellant trustee, having presented his accounts as such trustee to the county court for allowance, this item thereof, with others, was duly allowed and confirmed, against the objection of the respondent, *George H. Gordon*, the guardian *ad litem* of the minor children of the said Helmus M. Wells, deceased. The said guardian *ad litem* appealed from said order of allowance of said item of $1,000 to the circuit court, and that court reversed the order of the county court in that behalf on the ground that the trust reposed in said Helmus M. Wells by the will, to pay any part of the principal of said one-third part of said estate to the said Eva M. Odell, was a *discretion* reposed in the said Helmus, and, not having been exercised by him, did not survive, but failed on his death, and that the appellant, as his successor in the trust, had no power or authority to make said payment; and said trustee appealed to this court from said judgment.

The question thus presented depends upon the construction of this clause of the will: "Pay over to my daughter Eva any portion of the principal of said trust fund, *as it shall seem to him proper, for her comfort and support.*" This is an express trust and a mixed trust and power, or a trust power. Sec. 2123, R. S.; Perry, Trusts, § 20. The power is *imperative*, and imposes a duty on the donee or grantee, the performance of which may be compelled by action for

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the benefit of the party interested, and not a power made expressly to depend on the will of the grantee whether it shall be executed or not. Upon the death of the original trustee appointed by the will, the trust vests in the court, with all the powers and duties of the original trustee, to be executed by some person appointed for that purpose under the direction of the court. Sec. 2094, R. S. This power joined to the trust is *imperative* and must be executed, and the general trust is settled and fixed by the testator or settler of the trust. It makes no difference with such a trust power if the mode and details of its execution are left to the *discretion* or judgment of the trustee. Perry, Trusts, *supra.* A power *annexed* to the trust, which may be executed or not in the judgment or discretion of the trustee, is a mere naked power, and will not devolve upon a trustee appointed by the court upon the death of the original trustee. Such a power must be executed by the original trustee and by no one else, and, if not executed by him, fails. The learned counsel of the respondent contends that this is such a power, and so the circuit court held. We think it very clear that the testator intended that Eva M. Odell should have paid to her such part of the principal of this one-third of the estate as she might need from time to time for her comfort and support. The interest or income of this one-third of the estate would be an inconsiderable provision for that purpose. It was no doubt intended that this fund should be a permanent and certain resource, upon which the said Eva could depend and rely for her comfort and support during her natural life. On her death the will does not dispose of the whole fund, but only of what there may be *remaining of it*, if any, after securing by it her comfort and support. It would be a harsh and unreasonable interpretation of this clause of the will, and unworthy of the testatrix, that this tenderly cherished daughter should depend upon the mere will of her brother Helmus whether

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she should have any of this one-third share of her estate, especially after he had received one full third thereof to himself, and when, in case of her death childless, he would receive one full half of this share. This would make the said Helmus directly interested against paying any part of it to his sister Eva, however much she might need it for her comfort and support. Such an ungenerous construction of the will cannot be endured.

It does not affect this imperative power that the trustee may determine in his judgment or discretion, or "as it shall seem to him proper," the *portion* of the principal which the said Eva may need from time to time for her comfort and support. This judgment and discretion must be reasonably exercised. The abuse of discretion in such a case may be corrected by the courts. The beneficiary is entitled to any portion of the fund necessary or "proper" at any time for her comfort and support. What that portion shall be must necessarily be determined by some one, and this is the duty of the trustee, in the first place. Such a discretion is by no means unlimited. If it were, it might defeat the purpose and object of the bequest. I am satisfied that this is the true construction of this clause of the will, under our own statute. The statutes of Massachusetts, Maine, Vermont, and New York are like ours in this respect, and the cases cited by the learned counsel of the appellant are clearly in point. In *Nugent v. Cloon*, 117 Mass. 219, the testator authorized the trustee to sell any part of the trust estate "whenever and in such manner as he might deem expedient." The trustee died without executing this power. The trustee appointed in his place made sale of the land, and conveyed it to the purchaser. The sale was upheld, and it was held by the court that the second trustee could exercise the discretion vested in the first. That case is much stronger than this. In *Gibbs v. Marsh*, 2 Met. 243, the trustee was authorized to sell any of

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the real estate, "excepting one or two pieces, as *he should see fit.*" The trustee under the will did not accept the trust, and the court appointed a trustee in his place. His sale of the land was upheld. In *Cleveland v. Hallett*, 6 Cush. 403, the trustee was empowered to pay to the beneficiary *such part of the principal "as he should see fit,"* and declined to serve, and the one appointed in his place exercised this discretion, and it was upheld. See, also, *Leggett v. Hunter*, 19 N. Y. 445. In *Chase v. Davis*, 65 Me. 102, the power was that the trustees, "at their discretion," might, after five years, convey to the beneficiaries the trust estates. It was held that a trustee appointed by the court could execute this power and exercise this discretion. See, also, *Purdie v. Whitney*, 20 Pick. 25. In *Sargent v. Bourne*, 6 Met. 32, the trustees were authorized to pay so much of the annual income of the estate, not exceeding $5,000 a year, "as they shall judge necessary and proper for the comfortable and respectable maintenance of the said George P. and his wife and children," and advance and pay from time to time "such sum or sums *as they shall think necessary and proper* to educate the children." Trustees were appointed in the place of those who refused to serve, and it was held that they could execute the trust, as it was intended to be a provision made for George P. and his wife and children, liberal, comfortable, and respectable, and must not fail. There was good reason to hold such a power *imperative*, although the details were left to the discretion or judgment of the trustees.

I have availed myself of these authorities in the brief of the appellant's counsel to support what I deem to be the true distinction between trusts where the whole power is discretionary in the trustee and left to his will whether it shall be executed or not, and where the power is imperative and the mere manner, time, or mode of its execution only are discretionary. In the first case it is doubtful, to

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say the least, whether any trustee except the one appointed by the testator could execute the power, but we do not decide that question. But in the latter case the statute unquestionably authorizes the power to be executed by a trustee appointed by the court on the death or resignation of the original trustee. But the learned counsel contends that under statutes like ours — and has cited these cases to show it — a trustee can be appointed to carry out the trust and execute the power in any case of an express trust. We cannot so hold, and it is not necessary to the appellant's case that we should do so.

The appellant trustee, appointed by the court in place of the said Helmus M. Wells, deceased, therefore properly and lawfully paid to the said beneficiary the said sum of $1,000, as a portion of the said trust fund, and the county court properly allowed this item of his account.

By the Court.— The judgment of the circuit court is reversed, with direction to affirm the judgment of the county court, and the cause remanded for further proceedings according to law.

TAYLOR and others, Respondents, vs. HILL, imp., Appellant.

September 6 — October 17, 1893.

Life insurance: Legality of contract, when immaterial after payment: Construction: Guardian's accounting: Laches.

1. A married woman having procured insurance upon the life of her husband "for the sole use of" herself and his children, and the company, after his death, having voluntarily paid the amount to her and the guardian of the children, the question whether the company, under its charter and the law as it then existed, had the power to issue to a married woman a policy other than one payable to herself alone in case she survived her husband, is immaterial in a proceeding on behalf of the children to compel the guardian to account for the money so received by him.

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2. The policy in such case having in terms provided that the insurance should be paid to the widow *and children*, and having received a practical construction accordingly by all parties, the court will not consider, in the proceeding against the guardian, whether, construing together the policy and the charter of the company, the insurance was not payable to the widow alone.
3. There having been no designation in the policy of any inequality in the shares which the widow and children should receive, they were all entitled to share equally.
4. Although the guardian had in good faith turned over the whole of the insurance money to the widow, he was bound to account to his wards for their shares thereof; and he was not entitled to be credited with their support furnished gratuitously by the widow, their mother, with no intention of charging therefor.
5. Neither the statute of limitations nor any bar in analogy thereto — such as laches — would apply to the claim of the wards against the guardian, unless the full period of limitation had elapsed after the guardian's denial or repudiation of the trust.

APPEAL from the Circuit Court for *Dane* County.

Guardian's accounting. Plaintiffs and respondents are the children of George Paine, deceased, who died testate in July, 1870, leaving surviving his widow, Maria P. Paine (now Maria P. Clark), and his children, the plaintiffs, then aged fourteen, nine, and six years, respectively. By his will said deceased gave all his property to his wife, and said will was probated, and his wife appointed and duly qualified as executrix thereof. In February, 1860, Maria P. Paine effected a policy of insurance on the life of her husband in the Mutual Life Insurance Company of Wisconsin (afterwards the Northwestern Mutual) for $3,000. The premiums were paid by her husband, and the same was in force at the time of Paine's death. Said policy provided that in consideration of the annual premium the said company assured the life of George Paine for "the sole use of Maria P. Paine and children of George Paine." Said policy also stipulates as follows: "And the said company do hereby promise and agree to and with the said assured, their executors, administrators, and assigns, well and truly

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to pay or cause to be paid the said sum assured to the said assured, their executors, administrators, and assigns, in ninety days after notice, proof of death," etc., of George Paine.

August 5, 1870, the defendant *Hill*, having given the required bond, was appointed guardian of the plaintiffs upon the petition of Maria P. Paine, their mother, which petition represented that said minors had each an estate of about $1,000. The plaintiff *Ida*, being over fourteen years of age, joined in the petition. The plaintiffs had no other estate except their shares (if any) in the proceeds of this insurance policy. The sum due on the policy, after deducting unpaid premium notes, was $2,734.19, which sum was on the 2d of September, 1870, paid by a check payable to "Maria P. Paine and *James L. Hill*, guardian of *Ida Jane*, *George*, and *Frank M. Paine*." The check came into *Hill's* hands, and was indorsed by Maria P. Paine and by *Hill* as guardian, and a receipt was given, signed in a like manner. The entire amount was, with *Hill's* knowledge, passed to the credit of Mrs. Maria P. Paine's private account in the Bank of Madison (of which bank Hill was an officer), and was all drawn out by Mrs. Paine within the ensuing year.

It appears that *Hill* assisted Mrs. Paine in settling her husband's estate, and attended to her business affairs with the Bank of Madison. *Hill* made no inventory, and took no further steps of any kind relating to his guardianship, and never paid to the minors, nor any person for them, any moneys. He testified that he supposed that his appointment was a mere formal matter, and that he supposed that the money belonged to Mrs. Paine, and the court found that such was his belief, and acquitted him of fraud or bad faith. The children were supported and educated by Mrs. Paine out of her own funds,—*Ida* for ten years, *George* for seven years, and *Frank* for ten years; but she neither made, nor intended to make, any charge therefor.

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The Bank of Madison failed in September, 1873, and Mrs. Paine was a considerable creditor thereof, and secured and received dividends as such creditor. She testified that she did not know that the insurance money had all been placed to her credit till after the failure, but supposed that it was in the hands of *Hill* as guardian. *Hill* testified that Mrs. Paine knew that the whole sum was put to her credit in the bank at the time it was done. No specific finding was made by the circuit court on this point, except that Mrs. Paine subsequently learned of the fact. No demand was made on *Hill* to pay over or account for the moneys received by him as guardian until July 1, 1891, when these proceedings were begun. During the pendency of the proceedings in the county court Maria P. Paine (now Maria P. Clark) was brought in and made a party defendant.

Upon these facts the county court held that *Hill* should account for three fourths of said insurance money and interest, less fees and commissions; and upon appeal the circuit court held that the respondents were not chargeable with laches, and that each of the respondents was the owner of an undivided one-fourth of said insurance moneys, and that *Hill* account for the same, less fees, commissions, and counsel fees. No interest was allowed except interest from July 1, 1891, when the petition for accounting was filed. *Hill* appeals.

F. J. Lamb and *C. F. Lamb*, for the appellant.

For the respondents there was a brief by *Erdall & Swansen*, and oral argument by *J. L. Erdall.*

WINSLOW, J. The appellant's contentions are, in brief: *First*, that Mrs. Paine was the sole owner of the moneys realized from the insurance policy, because (a) under the law as it existed in 1860, and the charter of the insurance company, neither Mrs. Paine nor the company had power to enter into a contract of insurance for the immediate

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benefit of the respondents, and (b) even if such power existed, the true construction of the policy is that the loss is payable to Mrs. Paine alone if she survives her husband, and to the children only in case her death precedes his; *second*, that in any event the children are entitled to a moiety only of the fund; *third*, that Mrs. Paine, in whose hands the whole fund went, should be compelled to charge the plaintiffs with their support, and such sums should be credited to the guardian in his accounting; and, *fourth*, that plaintiffs have been guilty of laches which should prevent their recovering anything.

I. An elaborate and able argument was made by appellant upon the proposition that neither the company nor Mrs. Paine (she having no separate estate) had power to enter into a contract of insurance on the life of Mr. Paine, payable directly to their children. It was argued that a married woman without separate estate had not that power under the laws existing in 1860, and that the charter distinctly negatives the power of the company to issue such a policy. The company was chartered by ch. 129, P. & L. Laws of 1857. Sec. 2 of that act provides that the corporation "shall have no powers or privileges except such as are expressly granted by this charter." Sec. 3 provides that the corporation "shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to or connected with life risks, and to grant and purchase annuities." Sec. 17 provides as follows: "It shall be lawful for any married woman by herself and in her name . . . to cause to be insured the life of her husband for any definite period or for the term of his natural life; and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use. . . . In case of the death of the wife before the decease of her husband, the amount

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of the insurance may be made payable after death to her children for their use, and to their guardian if under age."

Under these sections it was argued that the only policy which the company was authorized to issue to a married woman was a policy payable to her alone in case she survived her husband, and to her children only in case of her death before that of her husband. The question is interesting, but we do not consider that it arises for decision in the present case. A very similar question was discussed in the case of *Hurd v. Doty*, *ante*, p. 1. In that case Mr. Justice CASSODAY said in the opinion: "Even assuming that such company might have resisted such payment, yet we are clearly of the opinion that in voluntarily making the payment the company violated no statute nor any principle of the common law or of good morals." This applies with equal force to the present case. The company issued a policy payable to the wife and children. They voluntarily paid the money due thereon to the widow and the guardian of the children. The transaction, so far as the company is concerned, was closed. The company could recover back none of the money paid. They waived the defense of *ultra vires*, if they had it. In a subsequent controversy touching the title to the money so voluntarily paid, the question of the power of the company to make the contract they did make cuts no figure. The contract is of importance now only in determining the question of the title to the moneys paid under it. Upon this question it was argued that the true construction of the policy is that the insurance is to be paid absolutely to Mrs. Paine in case she survives her husband, and to the children only in case of her death before that of her husband. This argument was based upon the claim that the charter defining the powers of the company must be construed as a part of the policy. This question also might be interesting, and perhaps doubtful, in an action against the company upon

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the policy, but it seems to us of no moment now. The company in no uncertain language agreed to pay the loss to Mrs. Paine and the children of Mr. Paine, "*their executors, administrators, and assigns.*" It would be doing violence to language to say that this means payment to Mrs. Paine in case of her survival, and to the children in case of her previous death. Furthermore, the parties in interest all participated in a practical construction and interpretation of the policy when it fell due,—the company, the widow, and the children through their guardian,—and they construed it to mean just what it says, namely, payment to the widow *and children.* The use of the word "sole" in the sentence "sole use of Maria P. Paine and children of George Paine" is certainly inaccurate in this view, but it cannot have the force of changing entirely the direct and specific promise of payment.

II. As to the shares which the widow and children are entitled to take under the policy we are clearly of the opinion that, in the absence of any designation in the policy of inequality in the shares, all the beneficiaries share equally. *Gould v. Emerson*, 99 Mass. 154; *Felix v. Ancient Order of United Workmen*, 31 Kan. 81; *Jackman v. Nelson*, 147 Mass. 300. The guardian should have retained in his hands, as the property of his wards, three fourths of the moneys received.

III. Can the guardian insist that he be credited with the support of the wards furnished by the mother gratuitously with no intention of charging therefor? We know of no principle of the law which would authorize this. She has never made any claim for such support, and now refuses to make any such claim. She was certainly at liberty to support her children gratuitously out of her own property if she chose, and if she chooses to make no claim therefor against them we do not see how any other person can make such claim.

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IV. Has there been laches which will bar a recovery? This question must be answered in the negative. As between the trustee of an express trust and his *cestui que trust*, the statute of limitations does not apply, nor does any bar in analogy thereto, unless the full period of limitation has elapsed since the denial or repudiation of the trust. Laches is a bar in analogy to the statute of limitations. *Fawcett v. Fawcett*, 85 Wis. 332.

By the Court.— Judgment affirmed.

REUTER, Appellant, vs. LAWE, Respondent.

September 8 — October 17, 1893.

Vendor and purchaser of land: Fraudulent representation as to title: Rescission.

1. A mere reference by a vendor to the property as "my land," in general conversations with the vendee, not shown to have had any reference to the proposed purchase, is not such a fraudulent representation of good title as will support an action to rescind the sale upon failure of title, even though the vendee may testify that he relied thereon.
2. Where a contract for the sale of land has been executed by delivery of the deed and payment of the purchase-money, and there is nothing to prevent the purchaser from taking possession, there can be no rescission, in the absence of fraud, even though the title fails. The remedy is on the covenants of the deed.

APPEAL from the Circuit Court for *Outagamie* County.

This action was brought to rescind a warranty deed of conveyance of a parcel of land in Kaukauna, made and delivered by defendant to plaintiff, July 15, 1890, and to recover the purchase price paid, on the ground that defendant fraudulently represented that he had title thereto, when in fact the major portion thereof was a public park. It appeared that the defendant was the original owner thereof,

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and had been in continuous possession thereof for many years, and was so in possession at the time the deed was made and the purchase money paid. There were no buildings on the land, but it was fenced, and frequently used, by defendant's permission, for church and society picnics. The plaintiff took no actual possession of the land, though there appears to have been nothing to prevent his taking possession if he chose. Some weeks after the transaction the city of Kaukauna took possession of the major part of the land, claiming that it had been dedicated to the public by the making and recording of a plat in 1851. Much testimony was introduced as to this and subsequent plats, and as to alleged acts of abandonment by the city; but, as the questions are not touched upon in the decision of the case, there is no necessity to state the testimony in detail. The plaintiff claims that the defendant fraudulently represented to him that he had good title to the premises; that he relied on such representations; that defendant had no title to the major portion of the premises; and that he (plaintiff) is consequently entitled to rescind and recover back his purchase money. The defendant denies any fraudulent or false representations, and alleges that he had good title to the whole property. The court found that the defendant had good title to the premises and made no false representations. From judgment dismissing the complaint, plaintiff appeals.

The cause was originally argued February 23, 1893.

Humphrey Pierce, for the appellant.

David S. Ordway, for the respondent.

On March 21, 1893, the following opinion was filed:

WINSLOW, J. In the examination of this case two questions of difficulty present themselves which were not adequately argued either in the oral argument or in the printed briefs. These questions are:

1. Did the taxation of the *locus in quo* as the property

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of *Lawe* from 1878 to 1890, in connection with nonuser and the other circumstances shown, operate to defeat the public rights therein either by way of abandonment or estoppel?

2. Do the facts shown in the pleadings and proofs constitute in law fraudulent misrepresentation or concealment which entitles plaintiff to rescind, after delivery of deed and payment of purchase price?

In our view these are vital questions in the case, and we have concluded to order a re-argument of these two questions.

By the Court.— Ordered accordingly.

The cause was re-argued upon the above questions, September 8, 1893.

Humphrey Pierce, for the appellant.

David S. Ordway, for the respondent.

The following opinion was filed October 17, 1893:

WINSLOW, J. We find it unnecessary to decide the question as to the sufficiency of defendant's title to the premises, and we intimate no opinion thereon. We affirm the judgment herein because no representations amounting in law to fraudulent representations were proven. The only representation proven by the plaintiff to have been made is the following, taken from the plaintiff's own evidence: "*Question.* Did he [defendant] make any statements to you before you purchased it as to its being his? *Answer.* He did always in any general conversations I had with him. He always called it '*my park.*'" Upon these general statements plaintiff says he relied, and it is not shown, either by admissions in the pleadings or by evidence, that he relied on anything else.

While authorities may be found holding that a direct false representation that the vendor has good title to land sold, relied upon by vendee, may be sufficient to sustain an

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action to rescind the sale, we are confident that none can be found holding that a mere reference by the vendor to the property as "my land," in general conversations with the vendee, will support such an action, even though the vendee may testify that he relied upon such expressions. Such a rule would convert into a fraudulent vendor nearly every person who sells land to which title afterwards fails. It would, in effect, supply a covenant of warranty of title in every real-estate sale. We cannot dignify mere general talk of the kind proven, which is not shown to have had any reference to the proposed purchase, into a fraudulent misrepresentation.

The element of fraud being entirely eliminated from the transaction, there can be no rescission, even though the title failed, because the contract had been executed by delivery of the deed and payment of the purchase money, and there was nothing to prevent the plaintiff from taking possession. *McLennan v. Prentice*, 85 Wis. 427. Under such circumstances the plaintiff's remedy is by action on the covenants of the deed.

By the Court.—Judgment affirmed.

RITCHIE, Respondent, vs. CATLIN and another, Appellants.

September 11 — October 17, 1893.

Deed: Extrinsic evidence to aid description: Plat.

In ejectment the complaint described the land as lots 194, 196, and 198, West Sixth street, in the city of Superior, and upon the town site of Superior as said town site has been surveyed and platted and the plat thereof recorded. A tax deed, dated in 1866, upon which plaintiff's title rested, purported to convey "West Sixth street, lots 194, 196, 198, in the town of Superior." *Held*, that although judicial notice could be taken of the fact that the territory of the town

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is now embraced in the city, yet the description in the deed did not, by itself, show that it referred to the land in suit. That description could, however, be aided by extrinsic evidence.

APPEAL from the Circuit Court for *Douglas* County.

Ejectment to recover three lots in the city of Superior. The complaint describes the property as situated in Douglas county, and "known as lots 194, 196, and 198 West Sixth street, in the city of Superior, and upon the town site of Superior as the said town site of Superior has been surveyed and platted and the plat thereof recorded in the office of the register of deeds for said Douglas county." The plaintiff's title rested on a tax deed from Douglas county, dated December 3, 1866, and duly recorded on the same day. It was admitted on the trial that the land in question was vacant from the time of the recording of the tax deed until July, 1891, when defendants took possession. It was also admitted on the trial that the original owner of the lots in question did not pay any taxes thereon for more than four years next preceding the recording of the tax deed, and that the grantee in the tax deed paid all taxes on the lands since the recording of the tax deed, and for more than three years thereafter, and that the title of said grantee has been duly conveyed to the plaintiff.

The tax deed was introduced in evidence, against the objection that it was not fair on its face and did not describe the lands described in the complaint. It is not deemed necessary to insert the deed in full. The description contained in the deed is as follows:

"The following described pieces or parcels of land lying and being in the county of Douglas, state of Wisconsin, to wit:

West Sixth street, lots	194; total amount,	$10.56,
	196;	$10.56,
	198;	$10.56,

— in the town of Superior."

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The action was tried without jury, and the court, after finding, among other things, the facts above set forth, substantially found that the tax deed was fair on its face; also as follows: "that the lots in question were in the town of Superior at the time of the assessment of said taxes and at the time of said tax sale; and, as indicated by the description, were tracts of land in a platted town site in said town of Superior, which has since been included within and forms a part of the territory within the city of Superior. There being no proof that any other descriptions of land designated as 'lots 194, 196, 198, West Sixth street' existed in said town of Superior at the time of the assessment of taxes and the tax sale upon which said tax deed was based, the presumption arises, and I find the fact to be, that the lands described in the complaint and the lands described in said tax deed are identical, and that the description, as contained in said tax deed, is definite and unambiguous. That the various statutes of limitation of this state applicable to this case to bar any claim of the original owner to the premises in question as against the plaintiff's title under said tax deed, were properly pleaded by plaintiff, and he insisted upon the trial that all claims on the part of the defendants as against his title under said tax deed are barred by the statutes of limitations of this state, applicable to the subject."

As conclusions of law the court found that the deed was not void for uncertainty, but was valid; that the statutes of limitations are a complete bar to defendants' claim of title, and that plaintiff is the owner in fee of the lands described in the complaint. From judgment on the finding, defendants appeal.

For the appellants there was a brief by *Catlin & Butler* and *Carl C. Pope*, and oral argument by *Mr. Pope*.

H. N. Setzer, for the respondent.

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WINSLOW, J. We entirely agree with the circuit judge in his conclusion that the plaintiff's tax deed is fair on its face, and we shall spend no time discussing this question.

There is another question in the case, however, upon which we think the circuit judge erred. The land sued for is described in the complaint as lots 194, 196, and 198, West Sixth street, in the city of Superior, *and upon the town site of Superior as the said town site has been surveyed and platted* and the plat thereof recorded. The tax deed upon which plaintiff's title is founded describes the property as certain lots in the county of Douglas, to wit, "West Sixth street lots 194, 196, and 198, in the town of Superior." Doubtless the court was right in taking judicial notice of the fact that the territory of the town of Superior is now included within the limits of the city of Superior, but even then it cannot be said, looking at the language of the deed alone, that the lots named are on the town site of Superior as surveyed, platted, and recorded, or in fact that there was such a town site in existence. The land cannot be located by the description in the deed alone. Can the deed be aided by extrinsic evidence? We think that it can. By its reference to a street, and to numbered lots upon such street, we think there is a clear reference to some recorded plat; and, such being the case, we think the description could be aided by extrinsic proof, as in *Reinhart v. Oconto Co.* 69 Wis. 352. If it was shown by evidence that there was in 1866 a recorded plat within the then limits of the town of Superior containing lots answering to the description in the deed, and no other recorded plat within such limits containing lots answering to the calls of the deed, we think that this evidence would render it certain that the description in the deed referred to such lots. But there was no evidence of the kind. The court presumed these facts, because there was no evidence

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to the contrary. This was reversing the rules of evidence. The plaintiff must recover, if at all, on the strength of his own title. Extrinsic evidence being absolutely necessary to show that the descriptions in the deed referred to the lots for which he sues, the plaintiff must introduce such evidence in making his case.

This view necessitates reversal. No other points require attention.

By the Court.—Judgment reversed, and action remanded for a new trial.

TAYLOR, Respondent, vs. MATTESON, Appellant.

September 11 — October 17, 1893.

(1) Res adjudicata: *Judgment on demurrer.* (2–5) *Corporations: Agreement by stockholders to indemnify indorser of notes: Unauthorized acts by indorser as president: Ratification: Accounting: Counterclaim: Parties.*

1. A judgment, upon demurrer, dismissing a complaint on the ground that it was insufficient by reason of the omission of an essential allegation, is not a bar to another action, the complaint in which contains such allegation.
2. Stockholders in a corporation having by a written contract severally agreed to indemnify such stockholders as were or should become liable upon the paper of the company as indorsers, each to contribute in proportion to the stock held by him, it is immaterial, in an action upon such contract against one who executed it unconditionally, that other parties signed it upon condition that it should be binding on them only if signed by all who were named therein.
3. The fact that the plaintiff in such action had received an increase in his salary as president of the company, as a consideration for indorsing paper of the company, does not preclude him from resorting to the contract of indemnity.
4. The fact that plaintiff as president issued, and personally indorsed, notes of the company beyond the limit fixed in the contract of indemnity, without authority from the corporation, and that the

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assets of the corporation were by its authority applied to the payment of the notes issued in excess of said limit instead of the notes within the terms of the contract of indemnity, at a time when the corporation was in fact insolvent, is not a defense to an action on the contract, since the corporation, whether solvent or not, had the power to ratify and to pay the notes so given by plaintiff, and defendant, not being a creditor of the corporation, could not be heard to question its action in that behalf.

5. In an action at law upon the contract of indemnity defendant could not set up a counterclaim for an accounting by plaintiff as to unauthorized or improper acts done by him as president of the corporation, because the right of action in respect thereto, if any, is in the corporation, and it is a necessary party to the litigation thereof, but is not a necessary party to the litigation of plaintiff's demand.

APPEAL from the Circuit Court for *Jackson* County.

This is an appeal from a judgment against the defendant upon the agreement set out in the case of *Taylor v. Coon*, 79 Wis. 78, 79, in which case the complaint was held "fatally defective, in that it did not aver that the plaintiff had paid the obligations upon which he was indorser, or had suffered any loss or damage by reason of his indorsements." 79 Wis. 86. A former action had also been brought by the plaintiff against the defendant, the complaint in which was defective for the reason above mentioned, but the defendant had answered it, setting forth various defenses and counterclaims, to certain of which counterclaims the plaintiff demurred for want of sufficient statements of fact to constitute counterclaims, etc., and for other reasons. After the decision of this court in *Taylor v. Coon*, *supra*, the circuit court "sustained the demurrer as a demurrer to the complaint," and adjudged it "to be insufficient, as not stating facts sufficient to constitute a cause of action," and final judgment was given in favor of the defendant on said demurrer, reciting, among other things, that the court "adjudged that the said demurrer reached back to the complaint, . . . that the complaint

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fails to state facts sufficient to constitute a cause of action, and that the defendant is entitled to judgment sustaining said demurrer as a demurrer to said complaint," etc.; and judgment of dismissal of the complaint followed.

The complaint in this action was the same as that in the former case, with the allegation added that the plaintiff had paid the notes of the Hudson Lumber Company in full, so indorsed by him and mentioned in the complaint, amounting to $19,000, for want of which allegation his former complaint had been dismissed.

The defendant set up various defenses and counterclaims, the matters relied on being:

First. That the judgment in the previous action was a bar to the present complaint.

Second. That the plaintiff presented the paper in question, which it had been agreed was to be signed by all the stockholders of the Hudson Lumber Company, to him for signature, requesting him to sign it; that the plaintiff represented to the defendant that all of said stockholders were going to sign it, and the defendant said that he would not, unless it was so signed; that it was understood that, unless all of said stockholders signed it, it would not be binding upon any of them or this defendant, and the plaintiff promised him that, if he signed it, it should not be of any force or effect until signed by each of said stockholders; that, relying upon these assurances and statements, he signed the same; that D. C. Hill, D. C. Davis & Sons, and George R. Jones, who were stockholders in all to the amount of eighty-five shares, and were men of means and financially responsible, were not requested to, and did not, sign the same.

Third. That the plaintiff, since more than a year prior to the execution of said agreement, had been president, one of the directors, and general manager of all the business and affairs of the company, and that he had been guilty of

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disregard of the duties of his trust, and through his neglect, inattention thereto, and gross mismanagement on his part, the capital stock of the company, which was fully paid in, had been dissipated, lost, and wasted, except that he had applied funds and property of said company in payment of debts of said company contracted by him, and for which he had become liable, but not covered by the agreement set forth in the complaint, leaving unpaid the notes mentioned in said complaint; that it was his duty to have applied said funds to the payment of the notes upon which the plaintiff became liable as indorser, and claimed to have been within the terms of the agreement on which the action was founded; that the funds of the said corporation had been used by the plaintiff in paying off debts and liabilities incurred by him without its knowledge or consent or that of the board of directors, so that the burden of paying the notes mentioned in the complaint was wrongfully and unjustly attempted to be cast upon the defendant and other stockholders who signed said agreement.

Fourth. By way of counterclaim, that as such president the plaintiff took exclusive control and management of the business, affairs, property, and funds of the company, and ignored its board of directors, and assumed the powers and functions of said board, and made contracts and improperly incurred debts to the amount of $50,000, without any authority from the company, and charged that the plaintiff had converted to his own use, as such, property of the company to the value of $30,000; that he had made false and misleading reports and statements to the stockholders, to their great detriment, and that in 1883, though said company was insolvent to the knowledge of the plaintiff, he concealed that fact from the other stockholders, and declared and paid a dividend of five per cent. on the stock, without the authority of the board of directors; and prayed, among other things, that the plaintiff be declared and com-

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pelled to render an account of all his doings and transactions, and to apply said money and property to pay off the notes mentioned in the complaint, and to make good the losses of the company sustained as aforesaid.

Fifth. By way of counterclaim, that the plaintiff is the holder of $10,000 stock in the Hudson Sawmill Company of Hudson, Wis., which became a purchaser of the real estate of the Hudson Lumber Company; that said stock was paid for by plaintiff out of the property of said lumber company, without defendant's knowledge or consent, while the plaintiff was such president, director and general manager, and that said stock ought to be adjudged to be held by him in trust to be sold to apply in payment of the notes mentioned in the complaint; that the plaintiff lives in Washington, D. C., and defendant has repeatedly and in good faith demanded the board of directors of the Hudson Lumber Company to bring an action in the name of the said company against the plaintiff for an accounting in respect to all the matters aforesaid, and to recover from the plaintiff the loss and damage sustained by him by reason of such alleged negligence, misconduct, and breach of trust, and to recover from him the value or the proceeds of the property so converted to his own use, as well as the value of said stock so obtained and received, or so much thereof as might be necessary, to be applied in payment of the notes mentioned in the complaint, but this the board of directors refused to do; that the said stockholders are under the control and direction of the plaintiff, and decline and refuse to act; that the Hudson Lumber Company is an insolvent corporation, and primarily liable on said obligations; that it is necessary for the protection of defendant to have the benefit of the claims existing in favor of the corporation against said *Taylor;* that the Hudson Lumber Company is a necessary party to the action, without whose presence a complete determination of the controversy cannot be had; and that

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the defendant is the owner of fifteen shares of the stock of the corporation, and the total number of shares is 500, of the par value of $100 each.

It was also contended that, as the plaintiff accepted an increase of salary of $600 per annum as a consideration for indorsing the paper of the Hudson Lumber Company, he had no right of recourse against the company nor upon the obligation on which the action is brought.

Application was made to the court for an order to bring in the Hudson Lumber Company as a party defendant, but the court denied it, and the defendant appealed from the order.

It appeared that the plaintiff ceased to do business as president and manager of the company in October, 1889, and it was then resolved by the stockholders that the company close its operations, sell out and convey its property, and apply the proceeds, or so much as might be necessary, to the payment of the company's indebtedness, and appointed Amos E. Jefferson as its agent to represent the company in negotiating the sale of its property, real, personal, and mixed, upon such terms as to price, etc., as he should, in his discretion, deem for the best interests of the company, and he was authorized and requested to apply the proceeds to the payment of the indebtedness of the company. This appears to have been adopted immediately after the plaintiff presented a statement of the resources and liabilities of the company and of its business of the then past year.

The court found that the defendant, for a good and valuable consideration, made and delivered the instrument in writing mentioned and set forth in the complaint, without any condition being attached to such delivery; that the plaintiff, in reliance on said written instrument, indorsed notes and paper of the Hudson Lumber Company mentioned, to a large amount, and on the 5th of February,

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1890, he was liable as such indorser for its benefit for the full sum of $19,000; that he was called upon to pay, and did pay, that sum on such paper out of his own personal funds; that he then had no money or funds in his hands or under his control belonging to the said company with which he could have paid said sum or any part thereof, and the Hudson Lumber Company was then insolvent and had no money, property, or funds with which to pay said sum; that the $19,000 was borrowed by the plaintiff for said Hudson Lumber Company without any vote, either by its directors or stockholders, but that said directors and stockholders had acquiesced in and ratified such action on the part of the plaintiff; that D. C. Hill, D. C. Davis & Sons, and G. R. Jones, owners of shares of stock in said Hudson Lumber Company, did not sign, nor were they requested to sign, the agreement; that the plaintiff was president and general manager of its business affairs, as claimed; that the plaintiff did not release the defendant from the obligation incurred by signing and delivering the instrument set forth in the complaint; that the defendant was the owner of fifteen shares of stock of the 500 shares of the company, and his proportional liability for said $19,000 was $507, with interest from February 5, 1890, amounting to $687, for which sum judgment was given.

Such other facts as are material appear in the opinion.

For the appellant there was a brief by *Bashford & Disney*, attorneys, and *H. H. Hayden*, of counsel, and a separate brief by *R. M. Bashford*, of counsel, and oral argument by *J. W. Bashford* and *R. M. Bashford*. To the point that the former judgment is a bar to this action, they cited *Bissell v. Spring Valley*, 124 U. S. 225; *Alley v. Nott*, 111 U. S. 472; *Lamb v. McConkey*, 76 Iowa, 47; *Clemins v. Clemins*, 37 N. Y. 74; *Cutler v. Wright*, 22 id. 474; *Carlin v. Brackett*, 38 Minn. 307; 1 Herman, Estoppel, secs. 122, 123, 125; 21 Am. & Eng. Ency. of Law, 216; *Oregonian R.*

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Co. v. Oregon R. & N. Co. 27 Fed. Rep. 283; *Outram v. Morewood*, 3 East, 358; *Greatherd v. Bromley*, 7 T. R. 455; *Henderson v. Henderson*, 3 Hare, 115; *Stafford v. Clark*, 2 Bing. 382; *Miller v. Covert*, 1 Wend. 487; *Bagot v. Williams*, 3 Barn. & C. 241; *Roberts v. Heim*, 27 Ala. 678; *Ellis v. N. P. R. Co.* 80 Wis. 459; *Edgar v. Buck*, 65 Mich. 356; *Bouchaud v. Dias*, 3 Denio, 244; *Perkins v. Moore*, 16 Ala. 17; *Robinson v. Howard*, 5 Cal. 428; *Aurora City v. West*, 7 Wall. 99; *Beloit v. Morgan*, id. 619; *Goodrich v. Chicago*, 5 id. 573; *Thompson v. Myrick*, 24 Minn. 11; *Harris v. Harris*, 36 Barb. 88, 94; *Embury v. Conner*, 3 N. Y. 522; *Richards v. Allis*, 82 Wis. 509; *Wilson v. Ray*, 24 Ind. 156; *Nispel v. Laparle*, 74 Ill. 306; *Ruegger v. I. & St. L. R. Co.* 103 id. 449; *Vanlandingham v. Ryan*, 17 id. 25; *Collins v. Bennett*, 46 N. Y. 490; *Jacobson v. Miller*, 41 Mich. 90, 99; *Lampen v. Kedgewin*, 1 Mod. 207; *Smith v. Hornsby*, 70 Ga. 552; Van Vleet, Collateral Attack, 29. By accepting an increase of salary on account of his being responsible for the money borrowed, plaintiff rendered himself personally liable for the entire amount, and thereby released this defendant. *More v. Howland*, 4 Denio, 264; *Elwell v. Chamberlin*, 31 N. Y. 611; Tyler, Usury, 95; Brandt, Suretyship, 235, 236; *Oakley v. Boorman*, 21 Wend. 588; *Ketchum v. Barber*, 4 Hill, 224, 235; *Cooper v. Page*, 24 Me. 75; *Silvey v. Dowell*, 53 Ill. 260.

Ray S. Reid, for the respondent.

PINNEY, J. 1. It has long been settled, as declared by DE GREY, C. J., in the *Duchess of Kingston's Case*, that "the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court." 2 Smith, Lead. Cas. pt. 2, p. 735. Identity of the subject matter is indispensable in order that the decision in the first action shall be effective as an estop-

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pel in the second. But a considerable difference has been expressed upon the extent of the estoppel, some cases holding that it extends only to the point actually decided, and that, where the record is indefinite in that respect, parol evidence is competent to make it plain. Other cases, and perhaps a decided preponderance of modern authority, are to the effect that the estoppel of the first suit is coextensive with the issue in it, and extends to whatever might, with proper diligence, have been brought forward and litigated under the pleadings in it. In this case, however, there is no uncertainty as to the point decided in the first action. The record on the subject is explicit, and excludes all presumption that might otherwise be held to exist that any other matter than the insufficiency of the complaint in that action was adjudged in it. It is plain that there is no legal identity between the alleged cause of action relied on in the first complaint and the one set out in the second. The judgment in the former case goes expressly on the ground that the complaint in it did not state facts sufficient to constitute a cause of action, and upon that ground and consideration only, and this is necessarily the extent of the estoppel, namely, that the facts stated in the complaint did not entitle the plaintiff to recover. But in the second action there is a new complaint, stating, in addition to the facts included in the former one, such other facts as are necessary to constitute a perfect cause of action. The diversity between the cases is apparent. The first complaint did not state a cause of action, but the second one does. Under the first complaint, evidence could not be received to establish a right of recovery, because, as this court had held in *Taylor v. Coon*, 79 Wis. 76, it was fatally defective; while under the second complaint the rights of the plaintiff may be fully established and adjudged, it being alleged therein that the plaintiff had paid the notes indorsed by him. The case, therefore, now before the court is a new

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one, upon which judgment has never been given, and it is in no proper or legal sense identical with the matter alleged in the other. The judgment did not, and could not, therefore, from the nature of things, determine that he had no case and should not have judgment in a subsequent action wherein he alleged such payment, and on grounds not disclosed in the first.

But the precise question has been decided in *Docter v. Furch*, 76 Wis. 153, where a judgment that the plaintiff's complaint did not state facts sufficient to constitute a cause of action, by reason of the omission of certain essential allegations, was held not to be a bar to another action by the same plaintiff in the complaint in which the defects in the former one are supplied, and that case is decisive against the bar invoked by the defendant in this. In 1 Freeman, Judgments (sec. 267), it is said that "if the court decides that the plaintiff has not stated facts sufficient to constitute a cause of action, or that his complaint is otherwise liable to any objection alleged against it, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the plaintiff to present his complaint in *another* action, so corrected as to be no longer vulnerable to the attack made in the former suit." And many cases are cited in a note in support of this conclusion.

In *Gilman v. Rives*, 10 Pet. 298, 301, it was held (STORY, J., delivering the opinion) "that a judgment that a declaration is bad in substance can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment on the merits." The cases of *Walden v. Bodley*, 14 Pet. 156; *Hughes v. U. S.* 4 Wall. 237; *Gould v. E. & C. R. Co.* 91 U. S. 526; and *Wiggins Ferry Co. v. O. & M. R. Co.* 142 U. S. 410,— are all to the same effect; and the same view is maintained in *Birch v. Funk*, 2 Met. (Ky.), 544; *Stowell v. Chamberlain*, 60 N. Y. 272; *Brackett v. Hoitt*, 20 N. H. 257; *Schindel v. Suman*, 13 Md.

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310; *Smalley v. Edey*, 19 Ill. 207; *Kittredge v. Holt*, 58 N. H. 191. It is well settled that the estoppel of an adjudication made on grounds of a purely technical character, *and where the merits could not come in question*, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. *Hughes v. Blake*, 1 Mason, 519; *Greely v. Smith*, 1 Woodb. & M. 181; *Carmony v. Hoober*, 5 Pa. St. 305; *Wilbur v. Gilmore*, 21 Pick. 253; *Vanlandingham v. Ryan*, 17 Ill. 26; *Harding v. Hale*, 2 Gray, 399. It is clear, therefore, both upon principle and authority, that the judgment in the first action was not a bar to the complaint in the second; and, as the judgment in the first action was given and rested solely on the insufficiency of the complaint, it did not establish judicially the truth of either of the counterclaims demurred to. Whether the defendant might have proceeded on them it is not material to consider, as he chose to take a judgment dismissing the action without obtaining any adjudication as to their merits.

2. In the case of *Taylor v. Coon*, 79 Wis. 76, we had occasion to construe and consider the legal effect of the writing upon which this action is founded, and it was held, in substance, that an action such as this was a legal action upon a contract of indemnity; that as it was a contract between the stockholders of the company, by which each signer "agrees with all the others, and each with such stockholders" as then were or should become liable upon the company's paper as indorsers or otherwise, "that *each* of said parties will so indemnify, protect, and save harmless such stockholders" so liable or becoming liable on such paper, "in proportion of each of said stockholders' ownership of said stock, and to that end will, upon the demand of any one or more of said stockholders who shall be called upon as indorsers to pay such paper, contribute in proportion to the stock held by him," the contract of indemnity

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was therefore to be construed as several, as respects each of the parties signing it, and that any one of them who has a valid claim thereon against the others may maintain a separate action upon it, against any one so liable for his proper proportion thereof, without joining the others as defendants; that a delivery of such contract to indemnify against loss or damage by reason of liability as indorser, by one who has signed it, to another of the signers, was a consent that it should be binding on him, although not signed by all who are named in the body of the instrument as parties. The testimony of the defendant shows that he executed and delivered the agreement in question to the plaintiff unconditionally, and irrespective of whether it should or should not be signed by all the parties named in it. Of the eighteen persons who executed it, the defendant appears to have been the last signing it. He describes what occurred at the time as follows: "I went into Spooner's office, and *Taylor* said, 'There is that bond. We want you to sign it.' I looked it over casually, and signed it. Spooner turned to his stenographer, and said, 'Insert *Matteson's* name in the bond;' and he inserted it, and I signed it and got up and walked out." He makes no claim in his testimony that he made or stated any condition about signing and delivering the instrument. It is wholly immaterial what either of the other signers may have said or insisted on when they signed what was, as to each of them, as well as the defendant, a separate contract, as much so as if there had been as many separate papers as there were signers of the paper in question.

3. The fact that the plaintiff received an increase of salary of $600 per annum for indorsing the paper of the company does not prevent him from having recourse upon the company as the maker of the paper, or from resorting to the agreement of indemnity in question. The $600 was paid him for assuming the risk of indorsing the paper, and

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not as a consideration for foregoing his rights and remedies as an indorser in that behalf. This seems to be too plain for argument.

4. It is not denied that the notes indorsed by the plaintiff, and paid by him, were within the terms of the defendant's contract of indemnity; but it is claimed that the plaintiff, as president of the corporation, issued and personally indorsed notes to an amount exceeding the $25,000 limit fixed in the agreement, without any authority of the corporation, and that the property and assets of the corporation were by its authority improperly applied to the payment of the notes issued in excess of the $25,000, and used for its benefit, at a time when the corporation was in fact insolvent, and that its property and assets should have been applied to the payment of the notes which were within the terms of the agreement of indemnity; that the plaintiff had sufficient of the property and means of the corporation in his hands to have paid off these notes, and should have made such application of it, but that he wrongfully converted and disposed thereof to his own use. Whatever he had in his hands as president or general manager he held subject to the control of the corporation, and for any abuse of his authority or trust he is liable only to the corporation. The corporation had the power, and it was doubtless right for it, to ratify and affirm any notes given in its business and for its benefit and in its name by the plaintiff, but without authority, and to direct the application of its property and means to their payment, so far as the defendant was concerned; and the defendant occupied no position which would give him a right to complain, even though the corporation was insolvent at the time, for it does not appear that he was or is a creditor of the corporation, and certainly as stockholder he could not be heard to question such ratification and application of corporate assets.

These considerations dispose, it is believed, of the vari-

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ous defenses urged to the plaintiff's claim. It is not necessary, in this action, to determine what are the rights of the various parties interested in the questions suggested, or in the various other matters set up by way of counterclaim, for we are of the opinion that they do not constitute proper counterclaims in favor of the defendant and against the plaintiff, and are not properly pleadable as such in this action. The counterclaims relied on assert various matters, in respect to which the rights of action, if any, are plainly in the corporation, the Hudson Lumber Company, and not in the defendant, and he is not otherwise interested therein except as a stockholder. He prays relief of various kinds on account of them, and that the corporation be made a party defendant, in order that these matters may be litigated, and he asserts that the corporation is wholly under the plaintiff's control and refuses to sue in respect thereof. This action is one strictly of a legal character on an obligation to which the corporation is not a party, and the claims thus attempted to be asserted in favor of the corporation are available neither as payment nor in setoff of the plaintiff's demand. The right of action in respect to them, if any, being in the corporation, a recovery, if any should be had, would belong to it and go into its treasury or to its assignee or receiver, if any, to be administered as its other corporate assets, whether recovered by the corporation itself or in an action prosecuted by the plaintiff as a stockholder, to which the corporation would be a necessary party. The defendant could not use the recovery in an action prosecuted by him as stockholder in payment or extinguishment of the plaintiff's demands against him. Cook, Stock, §§ 734–738; *Porter v. Sabin*, 149 U. S. 478; *Davenport v. Dows*, 18 Wall. 628; *Hawes v. Oakland*, 104 U. S. 450. The impracticability and unreasonableness of attempting to adjust the claims of the Hudson Lumber Company against the plaintiff, or to wind up its affairs and take an account of

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its assets and administer the same, in this purely legal action against one of the stockholders, bringing in all the necessary parties for that purpose, is too obvious to require discussion. The contention of the defendant in this respect is not, we are persuaded, sustained by any well-considered authority.

Besides, if the statements in the counterclaims were put in the form of an original complaint by the defendant, it is perfectly clear that the matters in question could not be litigated without the presence of the Hudson Lumber Company as a necessary party. This is really conceded by the defendant by his motion to bring in the corporation as a party defendant. For this reason the defendant could not set up the facts alleged as counterclaims, because they could not be litigated without the presence of a new and necessary party. *McConihe v. Hollister*, 19 Wis. 269; *Pennoyer v. Allen*, 50 Wis. 308, 310. As the plaintiff has brought a legal action, and seeks nothing but a money judgment, he cannot be compelled to bring in other parties than the one he has chosen to make defendant. *Coursen v. Hamlin*, 2 Duer, 513. No other person is a *necessary* party to the litigation of his demand. Sec. 2610, R. S., providing for bringing in a party whose presence is necessary for a complete determination of the action, or who has an interest in its determination to be protected, does not apply to this case. *Chapman v. Forbes*, 123 N. Y. 532, 540, 541. The case of *Stein v. Benedict*, 83 Wis. 603, is not inconsistent with this view. It was there held, merely, that where a party, or one not a party, intervenes and files a petition for equitable relief against a judgment, he may have new parties brought in, if shown to be necessary by his petition, which is in substance a substitute for an original complaint for relief against the judgment.

It follows from these views that the circuit court properly denied defendant's motion to have the Hudson Lumber

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Company brought in as a defendant, and its order in that respect is affirmed. These views dispose of all material questions presented by the record, and it follows, also, that the judgment of the circuit court is correct.

By the Court.— The judgment of the circuit court is affirmed.

PIERSTOFF, Respondent, vs. JORGES and another, Appellants.

September 11 — October 17, 1893.

DEBTOR AND CREDITOR: EQUITY. (1, 2) *Pleading: Judgment of court of special jurisdiction: Execution.* (3) *Adequate remedy at law: Demurrer* ore tenus. (4–6) *Creditor's action: Bastardy judgment: Prior fraudulent conveyances.*

1. Under sec. 2673, R. S. (which provides that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made), an allegation that plaintiff recovered a judgment against defendant and that it was duly docketed, is *held* to be equivalent to a statement that such judgment was "duly given or made."
2. An allegation that on a day named an execution was, in due form of law, issued upon a certain judgment, to the sheriff, and that said execution was duly returned by said sheriff wholly unsatisfied, sufficiently shows that a *legal* execution had been issued on the judgment and returned unsatisfied.
3. Where the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity.
4. A judgment debtor having fraudulently transferred book accounts and other personal property, and the fraudulent vendee having collected and appropriated to his own use moneys upon said accounts and from a sale of a part of the other property, the judgment creditor may, after the return of an execution unsatisfied, maintain an equitable action under sec. 3029, R. S., even though a part of the property is still in the possession of the fraudulent vendee and might be levied upon.

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5. A creditor's action under sec. 3029, R. S., may be maintained although plaintiff's judgment is one recovered by her in bastardy proceedings against the father of her child. The equitable powers of the court will be exercised in such action to enforce and make effectual the remedy given to the mother by the statute in relation to bastardy.

6. In such action the plaintiff may attack the validity of conveyances made by the defendant prior to the recovery of the judgment in the bastardy proceedings, on the ground that they were made with intent to hinder, delay, and defraud her in the collection of any judgment which she might recover in said proceedings.

APPEAL from the Circuit Court for *Iowa* County.

On January 6, 1890, the plaintiff recovered a judgment against the defendant *Julius M. Jorges* in a bastardy action, in the municipal court of Dane county, in which it was adjudged that said *Julius M.* pay to the plaintiff $250 forthwith and certain yearly payments thereafter. That judgment was duly docketed by and with the clerk of said court. The said *Julius M.* failing to comply with such judgment, he was committed to the county jail, where he remained for about ninety days, when he was discharged therefrom on proceedings by and before a circuit court commissioner. On January 14, 1891, an execution in due form of law was issued upon said judgment against said *Julius M.* to the sheriff of said county, to recover the sum of $495.43 then due and remaining unpaid thereon, which said execution was duly returned by the sheriff, wholly unsatisfied, January 14, 1891. On October 5, 1891, a second execution was issued, in due form of law, upon said judgment against said *Julius M.*, to said sheriff, for the sum of $585.43 then due and unpaid thereon, and that execution was also duly returned by said sheriff, October 8, 1891, wholly unsatisfied.

On or about January 2, 1890, the said *Julius* transferred to his father, the defendant *Henry*, a stallion, two colts, and a number of accounts, being all the property then

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owned by said *Julius* not exempt from seizure and sale on execution. On October 9, 1891, the plaintiff filed this creditor's bill, and served the summons and complaint herein, which complaint alleged, in effect, the facts stated, and that such transfer was made by the said *Julius* to the said *Henry* with the intent on the part of both of them to hinder, delay, and defraud the creditors of the said *Julius*, and particularly this plaintiff, and prayed that such sale be set aside and declared null and void, and that the defendants be adjudged to account for all moneys collected by them, or either of them, upon the accounts and demands mentioned, and for the proceeds of the sale of any of said property, and that the same be paid over to a receiver and be applied in payment of said judgment. To such complaint the defendants *Julius* and *Henry* separately answered, by way of admissions and denials, and set up that the transfers of said property were not fraudulent, but made in good faith, and for a *bona fide* debt owing by the said *Julius* to the said *Henry*.

Upon the trial of said issues the court found, as matters of fact, in effect, the recovery of said judgment in favor of the plaintiff and against the said *Julius*, and the issuing of the executions thereon, and the return thereof wholly unsatisfied, as mentioned; that prior to January 2, 1890, the said *Julius* was the owner and in possession of the personal property mentioned, and on that day executed and delivered a bill of sale of the same to his father, the said *Henry;* that the property included in said bill of sale, to the knowledge of the said *Julius* and the said *Henry*, was all the property of said *Julius* not exempt from seizure and sale on execution; that at the time of the execution and delivery of said bill of sale the value of said accounts thereby transferred was $105, and the value of the two colts so transferred was $50, and the value of said stallion so transferred was $250; that said *Julius* made said bill of

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sale to said *Henry* with the intent and for the purpose on the part of said *Julius* of hindering, delaying, and defrauding the plaintiff in this action in the collection of any judgment which she might recover in said bastardy proceedings; that the intent and purpose of said *Julius* to so hinder, delay, and defraud this plaintiff was at the time known to the said *Henry* and participated in by him, and the said *Henry* took and received the said bill of sale with the intent and for the purpose, on his part, of assisting the said *Julius* to so hinder, delay, and defraud the said plaintiff in the collection of any judgment which she might recover by said bastardy proceeding; that, since the execution and delivery of said bill of sale, said two colts have been sold and said accounts collected to the amount of $155, and the proceeds thereof appropriated by the said Henry, and that said stallion had considerably depreciated in value, and was worth not to exceed $225; that all the material allegations of the complaint were true.

As conclusions of law the court found that said sale of said horses and accounts, January 2, 1890, from said *Julius* to said *Henry*, was fraudulent and void as against the plaintiff in this action; that the plaintiff is entitled to judgment against the defendant *Henry* for the sum of $155, with interest thereon from the date of such findings, and to execution thereon and therefor, forthwith, to be collected out of any property of the said *Henry*, and also is entitled to judgment against the said *Julius* for the sum of $225, and to execution thereon and therefor, forthwith, against the said stallion, or any property owned by the said *Julius*, and is also entitled to judgment against the defendants for the costs and disbursements of this action, to be collected by execution out of any property of the defendants, or either of them; and judgment was ordered thereon accordingly. From the judgment entered accordingly the defendants appeal.

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H. W. Chynoweth, for the appellants, contended, *inter alia*, that the complaint was fatally defective in that it did not show a good judgment. As a pleading under the statute the complaint is clearly bad. *Roys v. Lull*, 9 Wis. 324; *Archer v. Romaine*, 14 id. 376; *Jarvis v. Robinson*, 21 id. 530. Where a judgment is not pleaded in accordance with the statute, it must be set forth with some particularity, and jurisdictional facts must be stated. *Roys v. Lull*, 9 Wis. 324; 2 Black, Judgm. sec. 965. The complaint does no show a legal execution issued on the judgment and returned unsatisfied. The statute requires that no execution shall be issued except upon motion of the mother of the child, or of a town or county interested, and by the order of the court itself. There is no allegation showing compliance with these requirements.

For the respondent there was a brief by *Erdall & Swansen*, attorneys, and *John M. Olin*, of counsel, and oral argument by *John L. Erdall*. They argued, among other things, that the municipal court of Dane county is not a court of inferior or special jurisdiction, within the meaning of sec. 2673, R. S. Secs. 2515, 2516, S. & B. Ann. Stats.; *Bookhout v. State*, 66 Wis. 415; *Raynor v. State*, 62 id. 295; *State ex rel. Le Clair v. Wright*, 80 id. 648. Though a court may be technically an inferior court or limited tribunal, yet if it has general jurisdiction of certain subjects, its proceedings and judgments in respect to those subjects will be sustained by the same liberal presumption as to jurisdiction which obtains in the case of a superior court; especially if it is a court of record and its procedure is in accordance with the course of the common law. 1 Black, Judgm. sec. 282; 1 Freeman, Judgm. sec. 122; 2 id. sec. 517; *Moffitt v. Moffitt*, 69 Ill. 641; *Johnson v. Beazley*, 65 Mo. 250, 254; *Davis v. Hudson*, 29 Minn. 27; *Stahl v. Mitchell*, 41 id. 325; *Harvey v. Tyler*, 2 Wall. 342; *Sheldon v. Newton*, 3 Ohio St. 500; *Andrews v. Avory*, 14 Gratt. 229, 236; *Delphi v. Startzman*,

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104 Ind. 343. Being a superior court, or at least one having general jurisdiction in bastardy cases, the presumption is that all acts done by the court in reference to bastardy cases are regular, and the allegation that the judgment was duly given or made is not necessary. 2 Black, Judgm. sec. 964; *Wilbur v. Abbot*, 58 N. H. 272; *Waltz v. Borroway*, 25 Ind. 380; *Hansford v. Van Auken*, 79 id. 302; *Bruckman v. Taussig*, 7 Colo. 561; *Holmes v. Campbell*, 12 Minn. 221; *Lathrop v. Stuart*, 5 McLean, 167. The complaint shows sufficiently that execution was issued. The presumption in favor of the regularity of the proceedings extends not only to the judgment but also to every act done by the court in relation to the matter. 1 Black, Judgm. sec. 270; *Cornell v. Radway*, 22 Wis. 260–265. Even assuming that the execution was not issued upon the motion of the mother, it would not be void but, at most, merely voidable. This has frequently been held with reference to executions issued upon dormant judgments without motion or leave of court. *Mariner v. Coon*, 16 Wis. 465; *Jones v. Davis*, 24 id. 229; *S. C.* 22 id. 421; *Bank of Genesee v. Spencer*, 18 N. Y. 150; 4 Wait, Pr. 10. The executions being at most merely voidable could only have been attacked directly by process to set them aside. *How v. Kane*, 2 Pin. 531; *Mariner v. Coon*, 16 Wis. 465; *Williams v. Hogeboom*, 8 Paige, 469. The allegation "execution in due form was issued," is the ordinary way of pleading the issuance of an execution. 1 Abbott, Forms, 570.

CASSODAY, J. There is no question but what the municipal court had jurisdiction of the bastardy proceeding against the defendant *Julius*. Sec. 2515, R. S. That court is made by statute a court of record, with a seal. *Ibid.* And the general provisions of law which were in force relative to circuit courts and the actions and proceedings therein, unless inapplicable, and the rules of practice for

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circuit courts, are by the statute made applicable to such municipal court; and its rules of practice and proceedings are thereby required to conform, as near as practicable, to the rules and practice of the circuit courts. Sec. 2516, R. S. Upon the trial of such cause, the issue is whether the accused is guilty or not guilty; and if found guilty he is thereupon to be adjudged the father of the child, and to stand chargeable with its future maintenance in such sum and in such manner as the court directs, and also for all expenses incurred by the mother for the lying in and attendance of her during her sickness, and also for the care and support of the child from the time of its birth, and for the costs of the prosecution, as ascertained and fixed by the court and inserted in the judgment. Sec. 1535, R. S. If such father, upon the rendition of such judgment, fail to give bond as required by the statute, then he must be committed to the county jail until he complies with and performs such judgment or is otherwise discharged according to law. Sec. 1536. After such father has been so imprisoned for ninety days, he may, pursuant to the statute, be discharged according to law. Sec. 1537. Upon being so discharged from such imprisonment, the court may, on motion of the mother of the child, from time to time, order execution to issue against such father for such sum as may at any time become due thereon and remain unpaid. Sec. 1538. Such are some of the provisions of the statutes under which it is claimed that judgment in such bastardy proceeding was rendered against the defendant *Julius*, and upon which he was so committed to jail and discharged, and thereupon two such executions issued thereon against him, and were, respectively, returned wholly unsatisfied before the commencement of this action.

1. Upon the trial, counsel for the defendant objected to any evidence under the complaint, and he now contends that the complaint is fatally defective in not alleging a

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valid judgment in the bastardy proceeding. The statute provides, in effect, that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, and that if such allegation be controverted the party pleading shall be bound to establish on the trial the facts conferring jurisdiction. Sec. 2673, R. S. Here the complaint alleges, in effect, that on the day named, "in an action for bastardy, in which the above-named plaintiff was the complaining witness, the said *Rosetta A. Pierstoff* recovered a judgment in the municipal court for Dane county against the defendant *Julius M. Jorges*, in which it was adjudged" as mentioned in the foregoing statement, and that on the day named "said judgment was duly docketed by the clerk of said municipal court." Such allegations are not denied by the answer of either of the defendants, nor any one of them. On the contrary, such allegations are inferentially admitted, by referring to "said judgment" as an existing, valid judgment. Such being the state of the record, we cannot hold the complaint defective in the particular mentioned. On the contrary, we think the allegation quoted is equivalent to stating that such judgment had been "duly given or made."

2. The objection that the complaint does not show that a *legal* execution had been issued on the judgment, and returned unsatisfied, is equally untenable. It is alleged that upon the day named "an execution was, in due form of law, issued against said defendant *Julius M. Jorges* upon said judgment, to the sheriff," and "that said execution was duly returned by said sheriff . . . wholly unsatisfied."

3. It is contended that the plaintiff had an adequate remedy at law. But no such issue is raised by the answer. Counsel contends that his objection to any evidence under

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the complaint did raise the question, and in support of such contention he cites *Trustees of Kilbourn Lodge v. Kilbourn*, 74 Wis. 452; *Mackey v. Michelstetter*, 77 Wis. 210. But in each of those cases the question was raised by regular demurrer. This court has repeatedly held that, "where the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity." *Sherry v. Smith*, 72 Wis. 339; *Becker v. Trickel*, 80 Wis. 484.

4. But counsel for the defendants contends that the cause of action alleged is not of equitable cognizance. The claim is that either of the executions might have been levied on the property still in the possession of the fraudulent vendee, *Henry Jorges*. But the sale from *Julius* to *Henry* was not an absolute nullity. It was binding between the parties and, at most, voidable at the instance of those having debts or rights of action against *Julius*. The return of the sheriff was presumptive evidence that none of the property so held by *Henry* belonged to *Julius*. Secs. 3029, 3780, R. S. If the sheriff had any reasonable doubt as to the ownership of such property, or as to its liability to be taken on the execution, then he was not obliged to levy thereon unless the plaintiff indemnified him against any damages he might sustain by reason of such levy. Sec. 2986. Possibly, and we may say probably, the plaintiff was unable to give such security. Was she thereby prevented from enforcing her judgment? The mere fact that a party has a remedy at law is not enough to bar him from proceeding in equity, even when the question is properly raised by the pleadings, unless such remedy is an adequate remedy. The statute declares that "whenever any execution against the property of any judgment debtor shall have been issued upon a judgment for the payment of

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money, and shall have been returned unsatisfied in whole or in part, the judgment creditor may commence an action against such judgment debtor, and any other person, to compel the discovery of any property or thing in action, belonging to such judgment debtor, and of any property, money, or thing in action due or held in trust for him, and to prevent the transfer" thereof, etc. Sec. 3029, R. S. This statute, upon the return of such executions wholly unsatisfied, seems to have given to the plaintiff the right to file and prosecute this creditor's bill, notwithstanding the fact that the stallion still remained in the open possession of the defendant *Henry*. But, even if this were otherwise, yet since it stands confessed that the fraudulent vendee, *Henry Jorges*, collected and appropriated to his own use $105 on the accounts, and received and appropriated to his own use $50 on the sale by him of the two colts, there can be no serious doubt but that the plaintiff was authorized to proceed by this creditor's bill to reach such things in action; and hence, in any view, the case was to that extent one of equitable cognizance, and, the court of equity having taken cognizance of the cause for that purpose, it was justified in going further and granting relief as to the stallion. *Peck v. School Dist.* 21 Wis. 516; *Hebard v. Ashland Co.* 55 Wis. 145; *Sherry v. Smith*, 72 Wis. 343; *Crump v. Ingersoll*, 47 Minn. 179.

5. It is contended that a resort to equity to collect a bastardy judgment is not permissible, that in such a case the two parties are equally at fault, and that equity will not help the one at the expense of the other. The answer is that the statute gives to the mother of the child a right of action against the father of the child, for her own benefit and protection. *Baker v. State*, 65 Wis. 54. The judgment is manifestly based upon a statutory right of action, and must therefore, until satisfied, be regarded as the conclusive evidence of an existing indebtedness.

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6. The able counsel for the defendants goes still further, and contends that a bill in equity will not lie where, as here, the statute has created a right and given a remedy without providing for a bill in equity; and he cites in support of such contention cases from this as well as other courts. These cases are to the effect that, where a new right is given and a specific remedy provided by the same statute, such remedy is exclusive. *Arnet v. Milwaukee M. M. Ins. Co.* 22 Wis. 521; *Hall v. Hinckley*, 32 Wis. 368; *Smith v. Lockwood*, 34 Wis. 72. Had the plaintiff attempted to enforce her claim against the father of her child by an ordinary action, instead of proceedings in bastardy, the rule thus invoked would have been applicable. But here she resorted to the specific remedy given by statute, and has exhausted that remedy without being able to make it available at law. The nature, purpose, and scope of a creditor's bill has frequently been considered by this court. *Clark v. Bergenthal*, 52 Wis. 103; *Smith v. Weeks*, 60 Wis. 94; *Ahlhauser v. Doud*, 74 Wis. 400; *Gilbert v. Stockman*, 81 Wis. 602; *Bragg v. Gaynor*, 85 Wis. 468. This creditor's bill is merely to bring into exercise the equitable powers of the court to enforce and make effectual the remedy thus given by statute. "The ground of the jurisdiction, therefore, is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution." *Freedman's S. & T. Co. v. Earle*, 110 U. S. 716. "Equitable execution," said BOWEN, L. J., "is equitable relief which the court gives because execution at law cannot be had." *Atkins v. Shephard*, 43 Ch. Div. 137,— where it was held that "what is commonly called equitable execution is not in fact execution, but equitable relief which is granted because there is a hindrance in the way of execution at law." In *Barker v. Dayton*, 28 Wis. 367, an execution for alimony had been returned wholly unsatisfied.

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Nevertheless, it was held, in effect, that supplementary proceedings, in their nature equitable, were available to enforce collection of the judgment, as in other cases. *Smith v. Weeks*, 60 Wis. 100. So an equitable action may be maintained to enforce a judgment for alimony. *Keyes v. Scanlan*, 63 Wis. 345. "Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation," said Mr. Justice FIELD, "its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation." *Railway Co. v. Whitton*, 13 Wall. 286. This was so held where the state statute created a new right of action and then undertook to limit the remedy to the state court. See, also, *Osborn v. Ordinary of Harris Co.* 17 Ga. 123, 63 Am. Dec. 230. It would hardly be contended that a judgment recovered under such a statute could not be enforced by creditor's bill.

7. Counsel, moreover, contends that the plaintiff could in no event be regarded as a creditor of the defendant *Julius* until she had recovered her judgment, and that she did not recover that until four days after the transfers mentioned, and hence that the plaintiff is in no condition to question the validity of such transfers. But the statute expressly avoids every conveyance or assignment of any estate or interest in goods or things in action, made with the intent to hinder, delay, or defraud creditors *or other persons of their lawful actions, debts, or demands*, as against the person so hindered, delayed, or defrauded. Sec. 2320, R. S. Thus, conveyances made by a man, a short time before his marriage, in fraud of his prospective wife's right of dower, are voidable under this statute. *Jones v. Jones*, 64 Wis. 301; *S. C.* 71 Wis. 513.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

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THE STATE EX REL. WITTE, Respondent, vs. CURTIS, Appellant.

September 26 — October 17, 1893.

Ditches and drains: Jurisdiction of town supervisors.

1. Under sec. 1359, S. & B. Ann. Stats., the town supervisors before proceeding to lay out and establish a ditch must determine that in their judgment it is demanded by, or will conduce to, the public health or welfare. Such a determination is essential to their jurisdiction, and unless it appears on the face of their proceedings their order laying out and establishing the ditch is void.
2. Sec. 1388, R. S. (making the order of the supervisors "presumptive evidence of the facts therein stated, and of the regularity of all the proceedings prior to the making of such order"), does not create a presumption of jurisdiction or supply jurisdictional defects in the order.

APPEAL from the Circuit Court for *Jefferson* County.

In attempted compliance with ch. 54, R. S., and the several acts amendatory thereof, the supervisors of the town of Hebron made and filed in the office of the town clerk of that town an order laying out and establishing a town ditch therein, located partly upon the lands of the relator, *August Witte*. He thereupon sued out a writ of *certiorari*, directed to such clerk, to remove the order and proceedings of the supervisors into the circuit court for review. That court reversed the order of the supervisors laying out and establishing such ditch, and adjudged such order to be null and void. The defendant, the town clerk, appeals from the judgment of the circuit court.

For the appellant there was a brief by *Kinne & Curtis*, and oral argument by *H. K. Curtis*.

L. B. Caswell, for the respondent.

LYON, C. J. Sec. 1359, S. & B. Ann. Stats., authorizes the town supervisors to lay out and establish a ditch in

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their town only in cases in which, in their judgment, such ditch is demanded by, or will conduce to, the public health or welfare. When, therefore, the supervisors meet to decide an application to them to lay out and establish a ditch under the statute, the first question to be determined by them is whether, in their judgment, such ditch is demanded by, or will conduce to, the public health or welfare. If this question be determined in the negative, that is the end of the matter. In such case the supervisors have no jurisdiction to lay out or establish such ditch. But if it be determined in the affirmative, then they have jurisdiction, and it becomes their duty to lay out and establish the same. In determining this question the supervisors act in a *quasi* judicial capacity, and their determination of it is their judgment in the premises which determines their authority or want of authority to lay out and establish the ditch; that is to say, it determines the question of their jurisdiction to act in the premises. The board of town supervisors is, of course, an inferior tribunal, and because it is so it must appear on the face of its proceedings that it has jurisdiction, or its proceedings will be void. 3 Bouv. Inst. p. 70; 12 Am. & Eng. Ency. of Law, 266, note 1. If jurisdiction does not appear on the face of the proceedings, its existence cannot be inferred from the mere fact that the supervisors have assumed to exercise it. 12 Am. & Eng. Ency. of Law, 274, and cases cited in note 3. The rule above stated is elementary, and was fully recognized and acted upon in *Muskego v. Drainage Comm'rs*, 78 Wis. 40. See, also, *Donnelly v. Decker*, 58 Wis. 461.

Sec. 1388, R. S., makes the order of the supervisors presumptive evidence of the facts therein stated and the regularity of all the proceedings prior to the making of such order. It is argued that this section cures the defect in the order, and creates a presumption of jurisdiction. It is obvious, however, that no such effect can be given to this

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provision of the statute. Much less was it intended to supply the omission of the judgment of the supervisors, which the statute makes the foundation of their jurisdiction and absolutely essential thereto. It cures omissions in the order going to the regularity only of the proceedings, but does not supply, and was not intended to supply, jurisdictional defects therein. Unless jurisdiction affirmatively appears by the record itself, there seems to be no authorized way for the appellate or supervisory court to ascertain whether the town supervisors had or had not jurisdiction in the premises. For the reasons above stated the circuit court held correctly that the order in question is null and void. It is unnecessary to pass upon any other question argued by counsel.

By the Court.—The judgment of the circuit court reversing the order of the supervisors is affirmed.

MERRIMAN and others, Respondents, vs. MCCORMICK HARVESTING MACHINE COMPANY and another, Appellants.

September 26 — October 17, 1893.

(1) *Practice: Order made at chambers.* (2) *Trespass* quare clausum: *Pleading.*

1. Upon a rule to show cause before the judge at chambers an order was made, signed by the judge under the formula "By the Court." In a subsequent rule to show cause why that order should not be set aside, it was referred to as an order made by the judge. Upon an appeal from an order denying the latter motion, the first order is treated as one made by the judge at chambers.
2. A complaint alleging that defendants broke and entered plaintiffs' close and entered their shops, etc., and took and carried away and converted to their own use certain described chattels, the property of plaintiffs, whereby plaintiffs suffered great damage in the loss of

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said property and in the interruption to their business carried on in said shops, etc., and were injured in their business standing and credit, and were damaged in all of the foregoing in the sum of $2,000,—is *held* to state but one cause of action, for a trespass *quare clausum fregit*, and to be sufficiently definite and certain.

APPEAL from the Circuit Court for *Jefferson* County.

Action for trespass *quare clausum*. The facts are stated in the opinion. The appeal is from an order denying a motion that the plaintiffs be required to make the complaint more definite and certain.

For the appellants there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

For the respondents there was a brief by *L. B. Caswell* and *W. H. Rogers*, and oral argument by *Mr. Caswell*. To the point that the complaint states but one cause of action, they cited, besides cases cited in the opinion, 2 Greenl. Ev. secs. 268, 635*a;* 2 Chit. Pl. 863–4, 866; McCall's Forms, 249, 278; *Root v. Foster*, 9 How. Pr. 37; *Johnson v. Smith*, 8 Johns. 383; *Grafton v. Carmichael*, 48 Wis. 660; *Raymond v. Sturges*, 23 Conn. 146.

ORTON, J. On the 6th day of April, 1893, there was granted a rule to show cause, in effect, why the complaint should not be made more definite and certain as to the purpose of the several causes of action stated therein, and why they should not be stated in separate counts, to be heard "before the Honorable JOHN R. BENNETT, presiding judge of said court, *at his chambers in the city of Janesville, in the county of Rock*, on the 13th day of April, 1893, at 10 o'clock in the forenoon." This rule was signed as follows: "By the Court, JOHN R. BENNETT, Circuit Judge of the Circuit Court of Jefferson County." On said 13th day of April there was an order denying said motion, signed: "By the Court, JOHN R. BENNETT, Circuit Judge." On the 15th day of April, 1893, there was granted another

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rule to show cause, based upon the papers and proceedings, "*and upon the order made by Honorable* JOHN R. BENNETT, *judge of said court, on the 13th day of April, 1893, denying the motion*," etc., why said order should not be set aside, vacated, and reversed, and why the complaint should not be made more definite and certain in the same respects as in the former rule to show cause. This rule was to be heard before the court at special term, to be holden at the court-house in the city of Janesville on the fourth Monday of April, 1893, and the order denying the same is dated April 24, 1893. This appeal is from this last order.

The first question argued by the counsel on both sides is one of practice,— whether the first order was a court order or by the judge at chambers. If it was an order by the court, not having been appealed from, it was *res adjudicata*, and the last rule to show cause ought not to have been entertained but should have been dismissed by the court; and the order thereon is not appealable so as to disturb or affect the first order, which was final on the same subject matter. It is contended by the learned counsel of the respondents that the defendants, having lost their right of appeal from the first order, could not restore or revive that right in effect by the last order to show cause why the first order should not be set aside, vacated, and reversed, and by the order denying the same, and by appealing therefrom. As we view the subject matter of both rules to show cause as to whether the complaint ought not to be made more definite and certain, this question appears to be immaterial, for we are of the opinion that both orders are substantially correct, and that the complaint is sufficiently definite and certain in the respects named. The only difference is between dismissing the last rule to show cause or entering an order denying the motion. The result is substantially the same. And so it is whether this appeal ought to be dismissed or the order affirmed. The first order we are dis-

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posed to treat as one made by the judge at chambers. The rule to show cause was to be heard "before the judge at *chambers*," and in the last rule to show cause why that order should not be set aside and vacated it is called an order made "by the *judge* of said court." By an apparent mistake the order is signed by the judge under the formula, "By the Court," and the clerk, probably by reason of this signing, made the same mistake in his certificate. The motion may have been heard before the judge at chambers during a term of the court, and hence the mistake. This case is materially different from that of *Hlawacek v. Bohman*, 51 Wis. 92. In that case there was nothing in the notice of the motion to indicate that it was to be heard before the judge at chambers, and the order was by the court. The last rule to show cause was, therefore, proper, in order to make the matter appealable to this court.

The order appealed from, as well as the first order at chambers, was clearly correct. The complaint does not appear to be liable to the objections named in the rule. It was sufficiently definite and certain as to the purpose of the several causes of action, and they need not be stated in separate counts.

The complaint states that the defendants broke and entered the plaintiffs' close, entered their shops, warerooms, yards, and premises, and took and carried away and converted to their own use one binder and harvester, one mower, seven pieces of canvas, a lot of gray irons, a large quantity of repairs, and various other articles, pieces of machinery, goods, wares, and merchandise, the goods and property of the plaintiffs, of various values, whereby the plaintiffs suffered great damage in the loss of said property and in the interruption to their business carried on in said shops, warerooms, and yard, and they were injured in their business standing and credit, and were damaged in all of the foregoing in the sum of $2,000. The learned counsel of the

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appellants contend that there are three several and distinct causes of action: (1) Trespass *quare clausum;* (2) trover and conversion; (3) injury to business and credit; and that they should be stated in separate counts. This form of the complaint in such a case has been sanctioned by the common-law practice of a great many years in England and in this country as the approved form of pleading. There is but one cause of action, and that is trespass *quare clausum fregit*, and the other continuous acts of the defendants are stated as the consequential damages arising therefrom and connected therewith. In the latest case in this court upon the question, *Sayles v. Bemis*, 57 Wis. 316, the complaint was that the defendant with force and arms broke and entered the plaintiff's premises, and tore down the fence, and the plaintiff's cow got out and strayed from the premises and was drowned, and by reason of these acts of the defendant the plaintiff was damaged $64. It was held that there was but one action, and that of trespass *quare clausum*, and that the other statements were for the consequential damages arising therefrom; and that, if these damages were not proved, the plaintiff would be entitled to recover nominal damages for the breaking and entering.

The approved forms in Chitty's Pleading (2 Chit. Pl. 616) are as follows: "*Broke and entered*" and "injured fences and gates, cut down trees, and dug holes," and "took and carried away plaintiff's corn, and converted the same to his own use," and "seized and took plaintiff's goods, iron, hops, household furniture, etc., and converted the same to his own use." These forms are under the heading of "Trespass to Lands," and these allegations are for the consequential damages arising therefrom. It will be noticed that the complaint here is nearly in the exact form of the above. See, also, McCall's Forms, 248; 1 Abb. Forms, 471; 1 Chit. Pl. 395 *et seq.;* 2 Greenl. Ev. § 273, and note; *Johnson v. Gorham*, 38 Conn. 519; *Jordan v. Staples*, 57 Me. 352;

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Belden v. Granniss, 27 Conn. 513; *White v. Moseley*, 8 Pick. 356; and other references in plaintiffs' brief.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

WILLIAMS, Respondent, vs. GIBLIN, Appellant.

September 26 — October 17, 1893.

Highways: Laying out and establishing: Jurisdictional requirements: Statutes curing irregularities: User: Abandonment.

1. Sec. 59, ch. 19, R. S. 1858 (providing that the order laying out a highway shall be "competent evidence of the facts therein contained, and shall be *prima facie* evidence of the regularity of all the proceedings prior to the making of such order"), even if it had a retrospective effect, could only apply to such prior highways as were in actual existence when it went into effect.
2. Compliance with the requirements of the act of April 15, 1843 (Laws of 1843, p. 46), as to an application in writing by six or more freeholders, and as to written notice of the commencement and route of the proposed highway and of the meeting of the commissioners to make an examination and survey, was essential to the jurisdiction of commissioners to lay out a highway; and where such compliance is not recited in the order or otherwise shown it cannot be presumed by virtue of sec. 59, ch. 19, R. S. 1858.
3. Travel in the vicinity of the line surveyed for a highway, without any work thereon by the public authorities, would not prevent the extinguishment of the highway, under sec. 80, ch. 16, R. S. 1849, providing that "every public highway already laid out, no part of which shall have been opened and worked within four years . . . shall cease to be considered as a public highway."
4. The evidence in this case is *held* not to show adverse user of an alleged highway for ten years after sec. 80, ch. 16, R. S. 1849, went into effect.
5. Ch. 19, Laws of 1857 (providing that all highways laid out and recorded, any portion of which shall have been opened and worked for three years shall be deemed to be legal highways so far as so

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opened and worked, notwithstanding the statutes may not have been in all respects pursued in laying them out), applied only to highways laid out and recorded by officers having jurisdiction of the subject matter, and was not intended to revive and validate a road which had previously ceased to be a public highway under sec. 80, ch. 16, R. S. 1849.

APPEAL from the Circuit Court for *Rock* County.

This action was commenced October 29, 1890, for unlawfully and with force breaking and entering upon the S. E. ¼ of the N. W. ¼ of section 22, township No. 4 N., of range No. 10 E., and cutting down and destroying one rod of the plaintiff's fence and one gate upon the plaintiff's said lands and possessions, September 19, 1890, and at divers other times, to the plaintiff's damage in the sum of $100. The answer alleged, in effect, that the *locus in quo* was a public highway, and had been for more than forty years, and also that the defendant was entitled to it as a way of necessity.

A jury was waived in the cause, and at the close of the trial the court found, as matters of fact, (1) that September 19, 1890, the defendant unlawfully and with force broke and entered upon the plaintiff's lands described, and unlawfully and with force cut down and destroyed one rod of the plaintiff's fence and one gate upon the plaintiff's said lands; (2) that the damage thereby sustained by the plaintiff was the sum of three dollars; (3) that there was no public highway in the forty acres of land described, at the point where said one rod of fence and said gate were destroyed. As conclusions of law the court found that the plaintiff was entitled to judgment for her damages of three dollars, and the costs of this action to be taxed, and that there was no public highway in or over said forty acres of land at the place named. From the judgment entered upon said findings in favor of the plaintiff, the defendant appeals.

For the appellant there were briefs by *F. J. & C. F. Lamb*, and oral argument by *F. J. Lamb*.

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For the respondent there was a brief by *Henry S. Sloan*, attorney, and *I. C. Sloan*, of counsel, and oral argument by *I. C. Sloan*.

CASSODAY, J. It is conceded that during the times in question the plaintiff was the owner and in possession of the south half of the northwest quarter of section 22, in the township of Union, Rock county; that for a great many years there has been a public highway, known as the "Union and Evansville Road," running north and south upon the east line of the plaintiff's land; that about a mile and a quarter west of that highway there has been, during the time mentioned, what is known as the "Madison and Beloit Road;" that in the record book of the town there appears to be the record of an order bearing date February 12, 1848, signed by two commissioners of highways, whereby it was ordered and determined by such commissioners, in effect, that a highway be laid out, to the width of three rods, from a point in the Union and Evansville road, about seven chains south of the northeast corner of the plaintiff's land, in almost a westerly direction, to the Madison and Beloit road, according to a survey given; that the trespass alleged and proved consisted in removing and cutting down a portion of the fence and a gate on the east forty of the plaintiff's land; and that there is no evidence of any notice to any of the owners of lands over which the alleged highway passed, of the laying out of the same, nor of the meeting of commissioners, nor of the awarding of damages, nor any paper respecting the same, except the record of the order mentioned. The contention is that that record must, under sec. 59, ch. 19, R. S. 1858, "be received in all courts and places as competent evidence of the facts therein contained," and must be regarded as "*prima facie* evidence of the *regularity* of all the proceedings prior to the making of such order." Sec. 1298, R. S. 1878. Such order, how-

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ever, has never been regarded as *conclusive* evidence of anything. *Roehrborn v. Schmidt*, 16 Wis. 519; *Williams v. Mitchell*, 49 Wis. 284; *State v. Logue*, 73 Wis. 598; *State ex rel. Jenkins v. Harland*, 74 Wis. 11. There is no claim that the section cited went into effect prior to the Revised Statutes of 1858,— more than ten years after the alleged laying out of the roadway in question. Prior to that statute, a party seeking to justify an alleged trespass upon the lands of another on the ground that the *locus in quo* was a public highway, had the burden of proving that all the essential steps required by the statutes to establish such highway had been regularly and properly taken. *Williams v. Holmes*, 2 Wis. 129; *Austin v. Allen*, 6 Wis. 134; *Babb v. Carver*, 7 Wis. 124; *Damp v. Dane*, 29 Wis. 419; *Ruhland v. Hazel Green*, 55 Wis. 664. Moreover, the section of the statutes cited only undertakes to make such order "competent evidence of the *facts therein contained*," and *prima facie* evidence of the *regularity* of all prior proceedings. Assuming that the section cited had a retrospective effect, yet it could only apply to such prior public highways as were in actual existence at the time the section went into effect. In other words, it could not have the effect of creating a public highway where none previously existed.

The original order, in the case at bar, is not in evidence, but merely a supposed copy of it, found in the record book of the town. This copy merely recites a meeting of two of the commissioners, pursuant to a notice to all to attend such "meeting for the purpose of *deliberating* upon the subject matter of this order," and that they had "caused a survey thereof to be made," as indicated. It does not recite that any applications, in writing or otherwise, had been made to the commissioners by "six or more freeholders" of the town, as required by sec. 1 of the act of April 15, 1843, then in force, nor that the commissioners had given

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notice, in writing, of the "commencement and route of such proposed highway," and "the several tracts of land through which the same" was proposed to be laid, as required by sec. 5 of the same act, nor that the commissioners had given notice, in writing or otherwise, of "the time and place at which" they would "meet to make such examination and survey," as required by the same section. Terr. Laws of 1843, p. 46. See secs. 50, 53, ch. 16, R. S. 1849; secs. 53, 56, ch. 19, R. S. 1858; secs. 1265, 1267, R. S. 1878. These several requirements of such statute then in force, and which were not mentioned in the order nor proved upon the trial, were clearly jurisdictional, and not such mere irregularities as sec. 59, ch. 19, R. S. 1858, was designed to cover, as to then existing public highways. Such jurisdictional facts cannot be assumed upon mere presumption. *Isham v. Smith*, 21 Wis. 32; *State v. Langer*, 29 Wis. 68; *State v. Castle*, 44 Wis. 670; *Ruhland v. Hazel Green*, 55 Wis. 664; *State ex rel. Witte v. Curtis*, *ante*, p. 140.

Sec. 80, ch. 16, R. S. 1849, provided that "every public highway *already laid out*, no part of which shall have been *opened and worked* within four years from the time of its being so laid out, . . . shall cease to be considered as a public highway." Sec. 85, ch. 19, R. S. 1858; sec. 1294, R. S. 1878. Even had the road in question been legally laid out, yet, if no part of it was "opened and worked" prior to February 12, 1852, then, in the language of the section last cited, it would have "ceased to be considered as a public highway" thereafter. We cannot say, from the evidence before us, and especially as against the findings of the trial court, that any part of the route described in the order as having been surveyed was ever "*opened and worked*" prior to February 12, 1852. True, many years ago, when the lands along that route and vicinity were uncultivated and unfenced, there was more or less travel, in an easterly and westerly direction, in the vicinity of the line so surveyed,

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and possibly such travel touched upon or crossed that line at one or more places; and it may be that such travel, had it been upon the line of the road so surveyed, would be regarded as an opening of the road within the meaning of the statutes cited; but, even then, we should be unable to find from the evidence that any portion of *that line* was ever "worked" by the public authorities. We do not say that the portion of the road opened or traveled should necessarily have been upon the precise route so surveyed, in order to prevent the road from becoming vacant by virtue of the statute last cited, but it should be substantially along that route.

We conclude that no public highway was ever legally laid out, and that, even if it had been, it would have ceased to be such public highway February 12, 1852, for the reason that no part thereof had been opened and worked prior to that date. If the *locus in quo*, therefore, at the time of the alleged trespass, was a public highway, it is because it had become such either by express or implied dedication, or by adverse user under some other provision of the statute. The learned counsel for the defendant expressly disclaim that they are seeking to establish a public highway by such dedication, and we are therefore relieved from considering that question. Counsel especially invoke that portion of sec. 80, ch. 16, R. S. 1849, which reads: "All roads not recorded which *shall hereafter* be used *ten years* or more shall be deemed public highways." Sec. 85, ch. 19, R. S. 1858; sec. 1294, R. S. 1878. That section went into effect January 1, 1850, and hence no such public highway could be established thereunder by virtue of such ten years' adverse user until January 1, 1860. The mere fact that the defendant claims under the record of a road which we have held to have been illegal does not prevent the defendant from availing himself of the provision of the statute last quoted, if the evidence otherwise brings the case

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within it. The evidence is voluminous, and we cannot go into details; but from a careful examination of the whole record we do not feel justified, especially as against the findings of the trial court, in holding that the *locus in quo* had been used as a public highway during the ten years mentioned, nor for any period of ten years prior to the alleged trespass. Confessedly, Williams fenced his lands and put gates, including the one in question, at different places across this alleged highway, as early as 1865, and maintained the same ever since, except when broken down or removed by others. Such fences and gates were continuous protests by him, as landowner, against the existence of any such *public* highway.

Counsel cite ch. 19, Laws of 1857 (sec. 86, ch. 19, R. S. 1858; sec. 1295, R. S. 1878), which declares, in effect, that "all highways *laid out* and recorded, any portion of which shall have been opened and worked for the term of three years . . . are hereby declared to be legal highways so far as they have been so opened and worked, notwithstanding the statutes may not have been in all respects pursued in laying out the same." This last clause was intended to obviate mere irregularities, and not jurisdictional facts. Moreover, the act was only intended to apply to highways which had already been laid out and recorded by officers having jurisdiction of the subject matter, or those which should thereafter be so laid out and recorded by such officers. For reasons already given, the road in question was not so laid out and recorded. The act was certainly never intended to revive and validate a road which had previously ceased to be a public highway by reason of not being opened and worked within four years from the time it was laid out, as required by sec. 80, ch. 16, R. S. 1849, for the obvious reason that that section was never repealed, but was continued in force by sec. 85, ch. 19, R. S. 1858, and sec. 1294, R. S. 1878. The one section was in-

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tended to validate legally laid out public highways notwithstanding any mere irregularities in laying out the same, provided they were so opened and worked within the three years mentioned; and the other was intended to vacate any public highway, notwithstanding it had been legally laid out, provided no part of it had been opened and worked within the four years mentioned. The view we have taken of the evidence, as already expressed, makes it obvious that ch. 221, Laws of 1861, is not applicable, and therefore does not operate to bar this action.

By the Court.— The judgment of the circuit court is affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent, vs. RICHARDSON and others, Appellants.

September 26 — October 17, 1893.

Railroads: Condemnation of land on which spur track has been constructed: Pleading: Necessity: Acquiescence in taking: Manufacturing plant or water power.

1. In a proceeding by a railway company, under sec. 1852, R. S., to condemn land on which a spur track has been constructed and has been in use for two years, the petition need not allege that "it is the intention of the corporation, in good faith," to use the land for the purpose of operating its road, as is required by sec. 1846, in a case where the track has not been constructed.
2. Where the land sought to be taken is a strip but eighteen feet wide, and the track runs through the center of such strip and has been in use more than two years, these facts show *prima facie* the necessity of taking the lands. [Whether it is incumbent on the company to show the necessity in the first instance, not determined.]
3. Where the owners of land assented to and acquiesced in the laying of a spur track thereon, the right to condemn the land therefor is perfect without proving a necessity for the taking; and they will not be heard to deny such right on the ground that the land taken is a part of a manufacturing plant or a water power.

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APPEAL from the Circuit Court for *Rock* County.

This is a condemnation proceeding instituted December 30, 1892, by respondent company, under sec. 1852, R. S., to acquire title to a strip of land across appellants' lots, in Janesville, upon which respondent built a spur track in the year 1890, and has ever since operated the same. This spur track was built to reach certain mills and manufacturing institutions in Janesville, and was authorized by the provision of ch. 276, Laws of 1883 (S. & B. Ann. Stats. sec. 1831*a*). Appellants' land is partly on the bank and partly under water in the bed of Rock river, and there is a manufacturing establishment thereon. The spur track runs across one corner of the property on the bank, and across a flume or canal which conveys water to appellants' factory from the Janesville dam, and then runs across Rock river to a number of mills on the opposite side.

The petition alleges the incorporation of the respondent company, the construction of the spur track in 1890, and its purpose and location, and that the strip of land sought to be condemned, viz., nine feet on each side of the center line of its track upon the bank, and eighteen feet on each side in the bed of the river, is required for the purposes of the branch or spur track, subject to the rights of all persons entitled to use the water power. The ownership of the land by the appellants is alleged, and the appointment of commissioners is prayed for. Upon the hearing, the appellants appeared and answered, admitting the incorporation of respondent, the construction of the spur track in 1890, and the operation thereof ever since, and their ownership of the land sought to be condemned, and denying everything not specifically admitted. The answer also alleged that the spur track was built without the consent of appellants.

No testimony was offered on either side, and the court, upon the petition and answer, made an order, dated Feb-

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ruary 4, 1893, that the respondent company was entitled to a right of way as prayed for, and appointing commissioners to appraise the damages. This order also contained very complete provisions for the preservation of the flume and water power, and the rights of all persons entitled to use the same. On the 24th of February, 1893, appellants moved to vacate the order of February 4th upon affidavits showing that the railway company had given no evidence in support of its petition for condemnation, and that the land sought to be taken was part of a manufacturing plant, the taking of which would be a great injury to the rest of the plant and to the appellants. On this motion the respondent read a large number of affidavits showing that the appellants consented to and acquiesced in the laying of the track on their lots, and that the land proposed to be taken was absolutely necessary for the track. The motion was denied, and from the order of condemnation, and the order refusing to vacate the same, this appeal is taken.

H. P. Richardson, for the appellants, contended, *inter alia*, that the railway company cannot condemn a right of way through a manufacturing plant for a side track to mills and factories. At common law a public highway could not be laid out through a house or building or the adjacent yard, without the consent of the owner; and this is declared by the statutes of this state. 4 Bac. Abr. 670; 1 Russell; Crimes, 339, 353, 472; 3 Burn's Justice, 551; 3 Comyn's Digest, 45, 46; *Hughes v. Trustees of Morden College*, 1 Ves. Sr. 188; Gould, Waters, secs. 21, 609; *Compton v. Susquehanna R. Co.* 3 Bland, Ch. 386–9; 1 Hawkins, P. C. ch. 32; *Clark v. Phelps*, 4 Cow. 204; *Ex parte Clapper*, 3 Hill, 460; *Albany N. R. Co. v. Brownell*, 24 N. Y. 352; *Mohawk & H. R. Co. v. Artcher*, 6 Paige, 86; *Starr v. Trustees*, 6 Wend. 566; *Flanders v. Wood*, 24 Wis. 572; *Seymour v. State*, 19 id. 242; R. S. secs. 1263, 1347, 1872, 1875, 895, 1359, 3375. A railroad is a public highway. *Olcott v.*

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Supervisors, 16 Wall. 678. A house or manufactory includes the yard or ground attached to it and used in connection therewith, within the meaning of this exception in the license to exercise the power of eminent domain. *Sparrow v. O., W. & W. R. Co.* 2 De Gex, M. & G. 101; *Swift & Given's Appeal*, 111 Pa. St. 516; *Grosvenor v. H. J. R. Co.* 1 De Gex & J. 453; *Furniss v. Midland R. Co.* L. R. 6 Eq. Cas. 473; *Ferguson v. London, B. & S. C. R. Co.* 3 De Gex, J. & S. 658, 659; *Spackman v. G. W. R. Co.* 1 Jur. N. S. 790; *Governors v. Charing C. R. Co.* 1 Johns & H. 400; *Pinchin v. L. & B. R. Co.* 5 De G., M. & G. 851; *Cole v. W. L. & C. P. R. Co.* 27 Beav. 245; *Alexander v. C. P. R. Co.* 30 id. 559; *King v. Wycombe R. Co.* 28 id. 104; *State v. Troth*, 36 N. J. Law, 422; Lewis, Em. Dom. sec. 284, p. 375; *Smith v. Martin*, 3 Saunders, 401; Co. Litt. 56*a*, 56*b*. Although an exception exists to this common-law rule in favor of the main line of a railroad, it has never been and should not be extended to a side track, and the burden of proving such extension is on petitioner. The side tracks are more feeders for the profit of the main line than to accommodate the public. *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449. The public must need to use the land to take it. It has been often held that no condemnation lies by a railroad company for a track to one factory. *Pittsburgh & W. R. Co. v. Benwood I. Works*, 31 W. Va. 710; *Matter of R., H. & L. R. Co.* 110 N. Y. 126, 127; *Re Niagara F. & W. R. Co.* 108 id. 380. Perhaps it might be urged here that the four or five factories or mills, which petitioner's map show are all that desire this side track, do not even make up a "public." Under all circumstances it would seem at least matter of doubt. *Att'y Gen. v. Eau Claire*, 37 Wis. 436, 437. *A fortiori* a right of way for a side track cannot be condemned through a manufactory when the side track is for other mills and factories, because such side track to mills and factories is a *cul de sac.*

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The railroad company must prove the necessity for the taking. *Wis. Cent. R. Co. v. Kneale*, 79 Wis. 89; *Wis. Cent. R. Co. v. Cornell Univ.* 52 id. 537; Sutherland, Stat. Const. sec. 387, p. 496. R. S. sec. 1831*a* says the railway company may take land for "*necessary* roadways and rights of way." The word "necessary" means, not convenient, but indispensable. *Greenwich v. E. & A. R. Co.* 24 N. J. Eq. 217; *Sharon R. Co. Appeal*, 122 Pa. St. 533.

For the respondent there was a brief by *John T. Fish* and *Jackson & Jackson*, and oral argument by *A. A. Jackson*. They argued, among other things, that when a railway company has entered upon lands with the consent of the owners, and constructed its railway and put the same in operation, their only remedy against the company is to have their compensation and damages assessed. *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 651; *Hanlin v. C. & N. W. R. Co.* 61 id. 522; *Milwaukee & N. R. Co. v. Strange*, 63 id. 183; *Taylor v. C., M. & St. P. R. Co.* id. 327; *Cassidy v. C. & N. W. R. Co.* 70 id. 440; *Midland R. Co. v. Smith*, 113 Ind. 233; *Indiana, B. & W. R. Co. v. Smith*, id. 308; *Bravard v. C., H. & I. R. Co.* 115 id. 1; *Louisville, N. A. & C. R. Co. v. Soltweddle*, 116 id. 257; *Louisville, N. A. & C. R. Co. v. Beck*, 119 id. 124. The statutes (S. & B. Ann. Stats. secs. 1828, 1831*a*) nowhere provide that a branch track shall not cross a manufacturing plant. They do not make the rights of the owners of a manufacturing plant any more sacred than the rights of other landowners. All classes of property, that which is used for manufacturing purposes as well as that not so used, is subject to the exercise of the right of eminent domain. *New York, H. & N. R. Co. v. B., H. & E. R. Co.* 36 Conn. 196, 198; *Smith v. Gould*, 59 Wis. 631–643; *Eastern R. Co. v. B. & M. R. Co.* 111 Mass. 125; *Central B. Corp. v. Lowell*, 4 Gray, 481; *Turnpike Co. v. V. C. R. Co.* 21 Vt. 590; *People v. Smith*, 21 N. Y. 598; *N. Y. C. & H. R. R. Co. v.*

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Gas Co. 63 id. 333, 334; *West River B. Co. v. Dix*, 6 How. 533, 534; *Boston W. P. Co. v. B. & W. R. Co.* 23 Pick. 360; *Hazen v. Essex Co.* 12 Cush. 475.

WINSLOW, J. Sec. 1852, R. S., provides that: "In any case when a railroad corporation shall not have acquired title to the lands upon which they shall have constructed their roadbed or track, or *any part thereof*, . . . the corporation may proceed to acquire or perfect such title in the manner hereinbefore provided." The manner hereinbefore provided is that laid down in sec. 1846 and the following sections. From the statements in the petition and admissions in the answer, it appears that the railroad company constructed its branch track upon the lands sought to be condemned in the year 1890, and has continuously operated the same ever since. There can be no question, therefore, of its right to commence these proceedings under sec. 1852, above cited. It is objected, however, that the petition does not comply with the statute because it does not allege that "it is the intention of the corporation, in good faith," to use the land for the purpose of operating the road. It is true that such an allegation is required by sec. 1846, in a case where the railroad is only projected and not yet built; but when the road has been actually built upon the land, and has been in use more than two years, we think these allegations amply sufficient. Good faith could hardly be asserted more unequivocally than by these facts.

It is objected, further, that the railroad company did not, in the first instance, offer any evidence to show the necessity of taking the lands sought to be taken. The strip sought to be taken is but eighteen feet wide across that part of appellants' land upon the bank of the river. The petition and answer show that the track runs in the center of this strip, and has been in use more than two years. These facts, alone, furnish a good *prima facie* case of neces-

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sity, if it was in fact incumbent on the railroad company to prove necessity in the first instance,— a point not here decided. Furthermore, it appears that the appellants appeared at the hearing of the original petition, and suggested the names of commissioners of appraisal to be appointed, and that one of the names so suggested was accepted by the circuit judge. It also appears that, upon the hearing of the motion to vacate, proof was submitted by the railroad company to show the necessity of the taking of these lands. Again, if it should be said that in an ordinary case the necessity must be shown in the first instance by the railroad company, there was ample and uncontradicted proof, upon the motion to vacate, showing that appellants practically assented to the laying of the track in the place where it was laid, and acquiesced therein. If this was true, the right to condemnation was perfect without proving necessity. In fact, it was the only resource left to the property owner. *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515. We conclude that there is no merit in the objection.

The appellants further claim that a railroad company cannot condemn a part of a manufacturing plant or a water power for the purpose of a branch or side track. They practically admit that such property may be condemned for the main track, but attempt to draw a distinction between the power of condemnation for the main line and for a side track. We have found no such distinction in our statute; but it is enough to say here that the consent and acquiescence which were so amply proven conclude the appellants upon the point.

By the Court.— Orders affirmed.

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WARDEN, Appellant, vs. SWEENEY, Respondent.

September 27 — October 17, 1893.

(1) *Appeal: Trifling error.* (2) *Tender.* (3) *Justices' courts: Offer of judgment: Costs.*

1. A verdict will not be disturbed because the trial judge made an error of ten cents in stating to the jury the amount which plaintiff should recover in case certain facts were found.
2. An alleged tender in this case is *held* to have been insufficient, the amount offered being less than was admitted to be due, and there having been no notice as to where the money or its equivalent might be found if the other party should conclude to accept it, and the tender not having been kept good.
3. An offer by defendant to bring into court a certain sum to be paid to plaintiff, unaccompanied by any offer to pay the costs up to that time, is not a sufficient offer of judgment under sec. 3627, R. S., to entitle defendant to costs subsequently accruing.

APPEAL from the County Court of *Dodge* County.

This action was commenced September 25, 1891, in a justice's court, to recover $90.80, the alleged value of a car load of hay purchased of the plaintiff by the defendant. The defendant answered to the effect that he only promised to pay the plaintiff for the hay, $84.92; that July 8, 1891, he tendered to the plaintiff that amount in payment therefor, but that the plaintiff refused to receive the same; that the defendant had ever since remained, and still was, ready and willing to pay to the plaintiff that amount for the hay, but that the plaintiff had hitherto refused to receive the same, and offered to bring the amount into court, to be paid to the plaintiff, if he would accept it.

On the trial the plaintiff recovered judgment for $90.80 damages and costs. The defendant thereupon appealed to the county court, where the cause was retried before and by a jury, and at the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages

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at $84.85. Thereupon the court held as matter of law that the defendant had before the trial duly tendered and paid into court the amount of said verdict, and hence that he was entitled to costs, which were taxed at $61.51, and rendered judgment in favor of the plaintiff for the difference between that amount and said verdict, to wit, for $23.34. The plaintiff appeals.

For the appellant there was a brief by *Elwell & Burke*, attorneys, and *H. W. Sawyer*, of counsel, and oral argument by *Mr. Sawyer*.

For the respondent there was a brief by *James E. Malone*, attorney, and *J. J. Dick*, of counsel, and oral argument by *Mr. Dick*.

CASSODAY, J. In March or April, 1891, the defendant weighed and pressed hay for the plaintiff, and attached to each bale a tag, upon which he marked the weight of such bundle. Such bales naturally shrunk in weight as the summer came on. In June, 1891, the defendant purchased of the plaintiff a car load of such hay, and was to pay therefor $12.25 per ton. The principal dispute on the trial was whether the defendant was to take the hay at the weight so marked on the tags or at its actual weight. We think the question thus in dispute was legitimately for the jury, and we do not feel warranted in setting aside the verdict as against evidence. *Hurd v. Milton*, 82 Wis. 406. Nor can we disturb the verdict because the judge in charging the jury made an error of ten cents in stating "that if the sale was made by actual weight the verdict should be $84.85." We conclude that the verdict is conclusive upon the plaintiff. But the trial court, as we think, erroneously allowed costs in favor of the defendant. The tender pleaded and attempted to be proved was entirely insufficient. Some time prior to the commencement of the action the defendant, through the agency of his wife, offered the plaintiff

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his check for the amount named in the verdict; but he refused to accept it. Such offer was renewed in money soon after, but the amount was less than the defendant admitted to be due, nor was it accompanied by any notice as to where the money or its equivalent would be kept or might be found in case the plaintiff should conclude to accept it, nor was it kept good.

The learned counsel for the plaintiff contends that the answer contained an offer of judgment as prescribed in sec. 3627, R. S.; and that, as the plaintiff failed to recover a more favorable verdict than he would have done by accepting the offer, he was not entitled to recover the costs made after the offer, but was bound to pay the costs so made to the defendant, as prescribed in sec. 3628, R. S. But for the defendant to avail himself of the benefit of sec. 3627, R. S., he was bound to accompany his offer to pay the $84.92 with the plaintiff's costs up to the time of making the offer, as prescribed in that section. This he did not do.

By the Court.—The judgment of the county court is reversed, and the cause is remanded with direction to enter judgment against the defendant for the amount of the verdict and interest and the taxable costs and disbursements of the plaintiff in the action, and for further proceedings according to law.

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KNOTT and another, Appellants, vs. TIDYMAN, Respondent.
KNOTT and another, Appellants, vs. TIDYMAN and others, Respondents.

September 28 — October 17, 1893.

Negotiable instruments: Intoxication: Fraud: Bona fide *purchasers: Agency.*

1. Notes and mortgages obtained, without consideration, from a person weak in mind and fond of liquor, by a designing and shrewd man whom he thought to be his friend, by plying him with liquor, playing on his fears as to the action of supposed creditors, threatening and cajoling him, until, in a state of intoxication and not realizing what he is doing, he signs the instruments, are void, both for lack of consideration and for fraud, in the hands of the payees and subsequent holders who are not *bona fide* purchasers.
2. Notice to an agent for the investment of moneys, of equities in favor of the makers of notes and mortgages in which he makes an investment thereof, is notice to his principal.
3. One who receives the notes of a third person, a part of which are past due, as collateral security for a pre-existing debt due him from the holder thereof, who had notice of equities in favor of the maker, is not a *bona fide* purchaser.

APPEALS from the Circuit Court for *Dodge* County.

One of these actions is founded upon three promissory notes signed by defendant *W. J. Tidyman*, for $125, $500, and $700, respectively, the first one being dated October 15, 1887, payable to *Samuel Roby* or bearer, April 1, 1888; the second dated August 24, 1887, payable to the order of *S. D. Roby* six months after date; the third, dated October 28, 1887, payable to *Mary E. Roby* (then the wife of *S. D. Roby*) or bearer one year after date,— and of all of which notes plaintiffs claim to be the owners and holders by transfer from one *P. R. Barnes.* The other action is brought to foreclose a certain real-estate mortgage given by defendant *Tidyman*, and *Albertina*, his wife, October 28, 1887, to secure a note of the same date given by *W. J. Tidyman* to

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the order of *Mary E. Roby* two years after date. The complaint alleges that *James L. Knott* owns an interest in this note and mortgage to the amount of $1,020, derived by transfer to him of said note and mortgage by said *P. R. Barnes*, September 15, 1888 (in whose possession the same then were), as collateral security for a loan of $1,020 then made by said *Knott* to *Barnes*. The complaint also alleges that said *Barnes* was the agent of *John Knott* to loan $3,500 placed in *Barnes'* hands in May, 1888, and that *Barnes* invested of said moneys $1,693.65 for his own benefit, and secured the payment thereof to said *John Knott* by transfer of all his interest in said note and mortgage. The date of this last alleged transfer is not given, but interest is claimed on *John Knott's* share from October 1, 1888.

The defense is practically the same in both actions. It is: *First*, an entire want of consideration for any of the notes; *second*, that the execution of the notes and mortgage was procured by fraud practiced on *W. J. Tidyman* by *Roby;* and, *third*, knowledge of the invalidity of the notes on the part of the plaintiffs before they came into possession of the same. The facts constituting the fraud were alleged to be as follows, substantially: That *Tidyman* was weak of mind and easily influenced; that he was on intimate terms with *Roby*, and supposed him to be his friend; that *Roby* falsely represented to him (*Tidyman*) that creditors were about to prosecute claims against him and sweep away all his property; that then *Roby* would ply him with liquor, and take him from saloon to saloon, still preying on his fears, and finally, having got *Tidyman* into a state of intoxication where he did not know what he was doing, would procure the execution of the notes in suit. In this way it is alleged that *Roby* secured not only the execution of the notes and mortgage in suit, but also other notes and chattel mortgages covering all the property, real and per-

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sonal, which *Tidyman* had. It was also claimed that the signature of *Tidyman's* wife, *Albertina*, was obtained to the mortgage by false representations as to its nature, she not knowing what the paper was.

The cases were tried without a jury, and the same evidence used in both cases. The findings of the court were substantially the same in both cases. They were to the effect that there was no consideration for the notes or mortgages ever given; that their execution was procured by the fraudulent practices alleged in the answers; that *Barnes* had possession of them as attorney for the *Robys*, but never owned them nor paid anything for them; that *Barnes* had full knowledge of the equities claimed by defendants when he got possession of said notes; that *Barnes* was the agent for both plaintiffs for the loaning of their moneys when the plaintiffs claim to have come into possession of said notes; that the plaintiffs knew of the equities claimed to exist by defendant when they obtained possession of the notes; that the plaintiffs are not owners for value, or *bona fide* purchasers; and that the notes and mortgages are invalid and worthless. From judgments for defendants in both cases, plaintiffs appeal.

For the appellants there were briefs by *J. C. Kerwin* and *W. W. Quatermass*, and oral argument by *Mr. Quatermass*. They contended, *inter alia*, that the notes and mortgage in suit were given by *Tidyman* to defraud his creditors, and hence are good even between the original parties. He cannot set up his own fraud as a defense. *Clemens v. Clemens*, 28 Wis. 637; *Davy v. Kelley*, 66 id. 454; *Gill v. Henry*, 95 Pa. St. 388; *Evans v. Dravo*, 24 id. 62; *Blystone v. Blystone*, 51 id. 373; *Carpenter v. McClure*, 39 Vt. 9. Semi-intoxication is no defense. The drunkenness must be total and at the moment of executing the instruments. *Gore v. Gibson*, 13 Mees. & W. 623; *Gardner v. Gardner*, 22 Wend. 526; *Harbison v. Lemon*, 3 Blackf. 51; *Cavender*

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v. Waddingham, 5 Mo. App. 457; *Bates v. Ball*, 72 Ill. 108.

For the respondent, *W. J. Tidyman*, in the first case there was a brief by *C. E. Hooker* and *J. E. Malone*, and in the second case a brief by the same attorneys for the respondents *W. J. Tidyman*, *C. E. Hooker*, *J. E. Malone*, and *Mary E. Roby;* and the causes were argued orally by *J. J. Dick* and *C. E. Hooker*.

WINSLOW, J. These cases present phases of human nature not pleasant to contemplate. A man, weak in mind and fond of liquor, falls into the hands of a designing and shrewd man whom he thinks to be his friend. The supposed friend plies him with liquor, plays on his fears as to the action of supposed creditors, threatens and cajoles him, until, in a state of intoxication and not realizing what he is doing, the victim at various times signs notes, chattel and real-estate mortgages, covering all his property, amounting to more than $3,000, without a shadow of consideration. That this constitutes fraud cannot be doubted. If courts cannot relieve against such impositions, they fail in an important part of their mission. But they can and do frequently relieve against just such machinations. *Kuelkamp v. Hidding*, 31 Wis. 503. See cases cited in the opinion of DIXON, C. J.

In the hands of *Roby* or his wife these securities were invalid for two reasons: First, because made absolutely without consideration; and, second, because they are the fruit of imposition, oppression, and undue advantage obtained by a cunning, sharp nature over a weak mind. They were conceived in sin and born in iniquity. But it is claimed that they are now in the hands of *bona fide* purchasers for value, and consequently the defenses of fraud and lack of consideration are no longer available. We shall not detail the evidence bearing on the manner in

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which these securities came into the possession of the plaintiffs. They came through the hands of *P. R. Barnes*, who obtained them in some manner and at some time from the *Robys*. The court found, and we agree in the conclusion, that *Barnes* paid no value for them, so that he cannot be considered a *bona fide* purchaser. The evidence shows, also, to our satisfaction, and evidently to the satisfaction of the court below, that *Barnes* had notice of the equities claimed by *Tidyman* as early as the middle of September, 1888. He obtained this knowledge by being employed by the *Robys* to defend an action in equity brought by *Tidyman* in March, 1888, to set aside and cancel the mortgage and its accompanying note, also the $125 note, on the ground of the fraud practiced by *Roby* on *Tidyman*. Then seems to have followed the jugglery by which *Barnes* endeavored to put the securities into the hands of the plaintiffs as *bona fide* purchasers. But the evidence shows they are not *bona fide* purchasers. *Barnes* was confessedly the agent of *John Knott* for the investment of his moneys, and had been such since May, 1888. The evidence shows that he attempted to invest part of *John's* funds in the mortgage and part in the notes. Just when this attempted investment of *John's* funds took place is not clear, but the evidence entirely satisfies us that it was after *Barnes* had knowledge of the fraudulent character of the securities. The $500 note and the $125 note were in the possession of the First National Bank of Waupun, as collateral to a note given by the *Robys*, from November 10, 1887, until September 18, 1888, so they could not have been used by *Barnes* until after that date. The $700 note is indorsed, "*Knott* collateral, Oct., '88." The conclusion is very strong to our minds, from the evidence, that the alleged interest of *John Knott* in these notes and in the mortgage was not acquired until after September 18, 1888, and after *Barnes* had full notice of the equities of

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the defendants. Notice to *Barnes* was notice to his principal. It was fresh in *Barnes'* mind; it is incredible that he could have forgotten it. *Brothers v. Bank of Kaukauna*, 84 Wis. 381.

It is strenuously denied by the plaintiff *James* that *Barnes* was ever his agent for the investment of his moneys, but that he (*James*) obtained his interest in the securities by deals made by him personally with *Barnes*, and without notice of any equities. Even if this were the fact, the plaintiff *James*, under his own evidence, would not be a *bona fide* purchaser of the notes not secured by the real-estate mortgage. He testifies substantially that they were turned over to him by *Barnes* in October or November, 1888, as collateral security for the payment of a pre-existing indebtedness owing from *Barnes* to him, and that two of them, at least, were past due. Under these circumstances he was not a *bona fide* purchaser of the notes. *Jenkins v. Schaub*, 14 Wis. 1; *Bowman v. Van Kuren*, 29 Wis. 219.

There are many circumstances in the case which tend to throw doubt on the direct testimony of *James* that *Barnes* was not his agent for the investing of money. It seems that *James*, *John*, and their mother had funds in the spring of 1888 derived from the settlement of the estate of the father of *James* and *John*. The shares of *John* and the mother were confessedly handed over to *Barnes* to invest and reinvest. *Barnes* was the attorney of the estate, and *James* was the administrator. *James* admittedly gave securities to *Barnes* to collect. The note and mortgage were left in *Barnes'* possession after the alleged transfer to *James*. There was direct testimony to the effect that *James* admitted that *Barnes* had all their money to invest. From all the evidence we conclude that the testimony shows *Barnes* to have been the agent of *James* as well as *John*, and consequently that *James* is also chargeable with

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the knowledge that *Barnes* had of the fraudulent character of these securities.

No other questions require consideration.

By the Court.—Judgments affirmed.

KELLY, Appellant, vs. KELLY and another, Respondents.

September 28—October 17, 1893.

Attorney and client: Champerty: Dismissal of action: Canceling champertous agreement.

1. When the fact that an action is being prosecuted under a champertous agreement comes to the knowledge of the court in any proper manner, the action will be dismissed. *Barker v. Barker*, 14 Wis. 131, adhered to.
2. A contract between attorney and client by which the attorney agrees, in consideration of $1, to prosecute an action and pay all costs, expenses, and counsel fees therein, and the client agrees that if awarded judgment she will pay him a certain share of the proceeds of the land recovered, but, if unsuccessful, said sum of $1 shall be full consideration for the attorney's services and counsel fees, is champertous.
3. An attorney prosecuting an action under a champertous agreement cannot, in his client's absence, cancel such agreement and proceed with the action, even though he has a letter of attorney authorizing him to sue and do all things necessary in that behalf.

APPEAL from the Circuit Court for *Dodge* County.

This is an action for the recovery of real estate. The answer was a general denial. At the trial the plaintiff's attorney, upon the demand of the attorney for the defendants, produced a certain agreement, dated February 23, 1892, by which the plaintiff's attorney, for and in consideration of $1, agreed to prosecute the action to final judgment and pay all costs and expenses and counsel fees

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therein, and, if the plaintiff should be awarded judgment for the land, she agreed to pay him a sum equal to one half the value of the land, if it sold for $3,000 or less, and a further sum equal to one third of what the land should sell for in excess of $3,000, and if she should not recover judgment in the cause then the sum of $1 should be full consideration for all services for attorney and counsel fees therein; also a power of attorney from the plaintiff to her said attorney, dated the 27th of February, 1889, by which the latter was appointed her true and lawful attorney to sue for, recover, and collect all sums of money or property coming to the plaintiff, or which she might be entitled to receive from the estate of her deceased father; to compromise or agree for the same or any part thereof, and give acquittances or other sufficient discharges, etc., upon such terms and conditions as he should see fit, and to do and perform all acts or things that might or should be necessary to be done in order to recover or collect the plaintiff's interest in the estate of her deceased father. These documents were given in evidence against the plaintiff's objection. The plaintiff's attorney testified to the inability of the plaintiff to furnish money to prosecute the action, and that she implored him to take charge of it; that she was absolutely penniless; that he was unwilling to take the case on speculation, and would prefer she would furnish the money, and she said it was impossible, and told him what she would do under the circumstances, and the contract was drawn up; that he had paid the costs of the litigation thus far, and had procured his friends to go security for the costs. The court held that the agreement was champertous. Plaintiff's counsel asked to surrender the contract and be allowed to proceed with the suit, but the plaintiff was not present. The court held that the contract could not be canceled by the action of one of the parties thereto, and dismissed the action on the ground that it was prosecuted under a cham-

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pertous agreement. The correctness of this ruling is the only question presented by the record.

For the appellant there was a brief by *Geo. W. Sloan* and *James J. Dick*, and oral argument by *Mr. Dick.*

J. E. Malone, for the respondents. [The cause was submitted without brief or oral argument.]

PINNEY, J. We were strongly urged to reconsider the rule laid down in the case of *Barker v. Barker*, 14 Wis. 131, holding that the law with regard to champerty, with certain limitations, exists as a substantive part of the common law, and still prevails in this state, and that the question whether a suit is prosecuted upon a champertous agreement is one outside of the real merits of the case, and, although no issue had been formed in regard to it, that, if the fact came to the knowledge of the court in any proper manner, it would refuse longer to entertain the proceeding. It was argued, as doubtless is the case, that the decision in *Barker v. Barker*, *supra*, is contrary to the great weight of authority. The rule laid down in *Barker v. Barker*, over thirty years ago, has ever since been considered and acted on as a substantive part of the law of Wisconsin, and has been frequently recognized in some cases, and in others expressly affirmed. *Miller v. Larson*, 19 Wis. 463; *Martin v. Veeder*, 20 Wis. 466; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Wis. 502. The doctrine in *Barker v. Barker*, in our judgment, is founded in sound policy and establishes a wholesome rule. We do not feel authorized to recede from it, in view of the long time that it has been in force without serious question; and, as the legislature has not seen fit to change it, it is not fit that at this late date we should interfere to do so by judicial decision. It is very clear that the agreement in question is champertous, and directly within the rule laid down in *Stearns v. Felker*, 28 Wis. 594; *Lathrop v. Amherst Bank*,

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9 Met. 489; *Ackert v. Barker*, 131 Mass. 438; *Blanchard v. Ferdinand*, 132 Mass. 389.

A satisfactory answer to the proposition of the plaintiff's attorney to cancel the agreement and proceed with the action, consists in the fact that there was no one present, representing the plaintiff, authorized to agree thereto. The plaintiff's attorney could not do so by virtue of his letter of attorney. It requires two parties to dissolve a contract, as well as to make one. The plaintiff's attorney could not act for the plaintiff in a matter in which they were interested adversely. For these reasons, the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

DULLEA, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 28 — October 17, 1893.

Railroads: Injury to person at highway crossing: Contributory negligence.

While driving along a highway towards defendant's track plaintiff crossed a bridge which had proper side protections. When 53 feet from the end of the bridge and 175 feet from the track he saw a train 55 rods distant approaching at high speed. He walked his horse to the end of the bridge, in compliance with a notice thereon, and then drove as fast as he could to the track, on which his buggy was struck by the train and he was injured. He might, before reaching the track, have turned into a side road which ran nearly parallel with the track. His horse was unused to the cars and easily frightened. *Held*, that he was guilty of negligence in deliberately attempting to cross the track in front of the train. The rule that accuracy of judgment is not required in the choice of the very best means of escaping imminent peril, has no application.

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APPEAL from the Circuit Court for *Washington* County.

Action to recover damages for personal injuries. The railroad of the defendant company passes through Barton, an unincorporated village. The track is crossed nearly at right angles by a public highway running through the village. This highway crosses the Milwaukee river on an iron bridge 117 feet long, with proper side protections. The end of the bridge nearest the railroad track is 123 feet distant therefrom. Plaintiff was traveling on this highway towards the railroad, and passed over the bridge. When 53 feet from that end of the bridge, and 175 feet from the track, he saw a train approaching the crossing in front of him, 55 rods distant therefrom. The train was running at a high rate of speed, charged in the complaint to be thirty miles an hour. Notice was posted on the bridge warning travelers, under a penalty, not to drive faster than a walk over it. When he saw the approaching train, plaintiff was driving on a walk, and continued to do so until he passed the bridge. He then drove his horse to the crossing as fast as he could, and when crossing the track the engine struck the hind wheel of his buggy and caused the injury complained of. On these facts the court denied motions for a nonsuit and that the jury be directed to find for the defendant, and submitted to the jury the questions made by the pleadings,— whether the negligence of defendant caused the injury complained of, and, if so, whether the plaintiff was chargeable with any negligence which contributed proximately thereto. The jury found for plaintiff, and assessed his damages at $2,000. The court denied a motion for a new trial, and judgment was entered for the plaintiff pursuant to the verdict. Defendant appeals from the judgment.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*. To the point that plaintiff was guilty of negli-

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gence in attempting to cross the track as he did, they cited *Myers v. B. & O. R. Co.* 150 Pa. St. 386; *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659; *Hansen v. C., M. & St. P. R. Co.* id. 631; Patterson, Railway Acc. Law, 171, sec. 176; *Grows v. M. C. R. Co.* 67 Me. 100.

P. O'Meara, for the respondent, contended, *inter alia*, that plaintiff's choice of his line of action was made in good faith in the presence of imminent danger. *Schulte v. C. & N. W. R. Co.* 44 Wis. 638; *Gumz v. C., St. P. & M. R. Co.* 52 id. 672; *Valin v. M. & N. R. Co.* 82 id. 1. The circumstances justified his attempt to cross the track. *Detroit & M. R. Co. v. Van Steinbury*, 17 Mich. 99; *Bonnell v. D., L. & W. R. Co.* 39 N. J. Law, 189; *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489; *Aaron v. Second Ave. R. Co.* 2 Daly, 127; *Baxter v. Second Ave. R. Co.* 30 How. Pr. 219.

LYON, C. J. Plaintiff claims that his horse was unused to the cars and unreliable, and that in the exercise of his best judgment he thought it safer to make the attempt to cross the railroad track in front of the train rather than to risk stopping before he reached the track. His counsel invoked in his behalf the rule that, in presence of imminent peril, accuracy of judgment or the choice of the very best means of escaping the peril is not required. The rule has no application to the facts of this case. Strictly obedient to the posted notice requiring him to walk his horse over the bridge, he deliberately allowed the animal to walk fifty-three feet after he saw the approaching train, and then, after sufficient time had elapsed to allow the train to cover half the distance between the point where it was when he first saw it and the crossing, with equal deliberation he commenced his race with the train, driving his horse as rapidly as he could until the engine struck his wagon. Whatever margin should be allowed plaintiff in the choice of means to keep himself, horse, and buggy out

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of the way of the train, he cannot, under the circumstances of the case, be justified or excused in his attempt to cross the track in front of the train, especially after he deliberately threw away valuable time before speeding his horse, and when he is chargeable with knowledge that the train was so close to the crossing as to make the attempt extremely perilous. His duty was plain, and would have been at once comprehended by any person of ordinary nerve and discretion. It was to stop his horse, either on the bridge or after he passed it, until the train passed, or to have turned into a side road which intersected that on which he was traveling, and which ran nearly parallel with the track. If the horse was easily frightened, plaintiff should have kept him as far from the train as possible, rather than to rush him upon the train as he did. At any rate, it was his duty to wait at some point for the approaching train to pass, and his failure to do so was negligence which caused or contributed directly to the collision. If authorities are required to a proposition so well settled as this, they will be found cited in the brief of counsel for the defendant. The court should have nonsuited the plaintiff, or, failing to do so, should have directed a verdict for the defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

COHN, Appellant, vs. HEIMBAUCH, Respondent.

September 28 — October 17, 1893.

Evidence: Impeachment of witnesses: Sunday contract: Sale completed by delivery.

1. The defendant in an action for the conversion of a horse cannot be impeached, or his testimony contradicted, by the minutes of his testimony on a prosecution of plaintiff for stealing the horse.

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2. A witness cannot be impeached by asking him if he had not "once before" testified differently.
3. A party cannot manufacture testimony for himself by proving what he said at some former time.
4. One who sells and delivers property on Sunday cannot afterwards maintain an action for its conversion by the purchaser, on the ground that the contract was illegal.

APPEAL from the Circuit Court for *Waukesha* County.

The case is stated in the opinion. The plaintiff appeals from a judgment dismissing the complaint.

For the appellant there was a brief by *P. H. Carney* and *D. S. Tullar*, and oral argument by *D. S. Tullar* and *E. Merton.*

For the respondent there was a brief by *Thomas M. Kearney*, and oral argument by *Wm. Smieding.*

ORTON, J. This is an action of trover for the conversion of a horse in April, 1884.

The testimony of the defendant and his witnesses tends to prove the following facts: The plaintiff, on the last Sunday in June, 1882, sold the horse to the defendant for the sum of $125, payable on demand, and delivered the possession of the same to the defendant at the same time. The defendant retained the possession of the horse for several months, when it escaped or was stolen from his barn, and after much search and inquiry it was found in the possession of the plaintiff, and the defendant regained the possession of the horse by a writ of replevin. The defendant offered and tendered to the plaintiff the price agreed upon, which was refused. The defendant sold the horse to a stranger, and it was taken to parts unknown to him.

The testimony of the plaintiff and his witnesses tends to prove the following facts: On and before the said last Sunday in June, 1882, the horse was and had been kept in the pasture of the defendant, and the defendant spoke of buy-

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ing it if it suited him after trial and they could agree upon the price. The horse was hitched with another in a wagon, and both parties, with one or two others, drove to Waterford, Racine county, to try the horse, and while there the question of price was discussed. The plaintiff asked $150, and the defendant offered only $115, and they were unable to agree; and the defendant drove the horse back to its pasture on his premises, as he supposed. The next September the plaintiff was stopping at "Lavins," in the town of Vernon, and when he got up in the morning the horse was standing at the gate, and he took the horse and had it pastured.

The jury found that the plaintiff sold and delivered the horse to the defendant on the last Sunday in June, 1882, and that it was of the value of $150. The court also made the same finding, and also that at the time of the sale and delivery it was agreed that the defendant should pay to the plaintiff the sum of $125 for said horse, and that said purchase price has not been paid, and that there was no agreement entered into between the parties respecting the property subsequent to said sale; and, as a conclusion of law, that the contract was made in violation of law, and that the defendant was the owner and entitled to the possession of the property; and judgment was entered, dismissing the complaint with costs.

Most of the errors assigned are on the admission or rejection of testimony, and the remarks of the court in connection therewith. The exceptions, as well as the questions and answers, are very much confused, and it is very difficult to understand what they mean.

1. The plaintiff, it seems, was prosecuted for stealing the horse from the defendant, before a justice, and the defendant was sworn as a witness; and the counsel of the plaintiff wished to show that the defendant testified on that examination differently, as to the bargain being consummated

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on Sunday at Waterford, from his testimony on the trial. The justice had the minutes of his testimony present, and he was asked, "Did he further answer, 'when we got to Waterford?'" and "Did he say he bought the mare." The court said, "We can't go over that trial. He talked about buying, as he testifies now. As he claims, he concluded the trial at Waterford on the Sunday in question." The counsel, as it appears, was trying to impeach the defendant, or contradict his testimony, by the minutes of his testimony on that prosecution. That was neither necessary nor proper. The defendant was a party, and the plaintiff could prove by any one what he said on that examination, or anywhere or at any time, about the sale being made on Sunday, and the court properly said that "we can't go over that trial." Afterwards, the court ruled out that record, and then said, "I have examined the evidence, and there is no apparent contradiction in the answer to what he testified here." The counsel of the plaintiff still persisted, "We make the offer," and "offer to prove," etc., and the court said: "I rule out the answer. The answer ruled out." The court was patient, considerate, and clearly right.

2. One Zelotus Hill, a witness for the defendant, was asked, on cross-examination, if he had not testified once before to a conversation with plaintiff, in which plaintiff denied that he had sold the mare. The court said he did not think it at all material, and excluded it. The question was clearly improper as well as immaterial. The plaintiff could not manufacture testimony for himself by proving what he said at some former time, and the witness could not be impeached in that way. He must be asked if he said so and so at a particular time and place. The question, "Did you hear the plaintiff say, in your conversation with him afterwards, that he would sue for the mare?" was objectionable for the same reasons. There are some other exceptions, but they do not appear to be material.

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3. The learned counsel of the appellant make many objections to the judge's charge to the jury, which we cannot consider because no exceptions were taken to it at the time. But we have read the instructions of the court, and they do not appear to be liable to any objections whatever.

4. On the motion for a new trial, and for judgment in favor of the plaintiff, we are called upon to consider the merits of the case on the testimony. The parties are in direct conflict in their testimony as to whether there was a sale and delivery of the horse on the last Sunday in June, 1882. The testimony of the defendant is corroborated to some extent by the testimony of other witnesses. It is, to a considerable extent, a question of credibility for the jury to determine, and their verdict should not, therefore, be disturbed. *Poertner v. Poertner*, 66 Wis. 644. The jury, as well as the court, found that there was a sale and delivery of the horse on Sunday, and that must be accepted as a verity in the case. The contract was completed and executed on Sunday, and therefore illegal. The defendant, as the vendee of this property by a sale and delivery on Sunday, may claim the protection of the maxim, "*In pari delicto, potior est conditio defendentis.*" The court will neither enforce nor set aside a contract which is illegal, and not fraudulent, from being made on Sunday. *Hill v. Sherwood*, 3 Wis. 343. *Moore v. Kendall*, 2 Pin. 99, is in point with the facts. *Swartzer v. Gillett*, 2 Pin. 238; *Melchoir v. McCarty*, 31 Wis. 252; *Troewert v. Decker*, 51 Wis. 46; *Knox v. Clifford*, 38 Wis. 651; *Clarke v. Lincoln L. Co.* 59 Wis. 655; *Worcester v. Eaton*, 11 Mass. 369. The full statement of the principle is that when both parties enter into an illegal contract, without fraud on the part of either, the courts will leave the contract as they find it, without a remedy to either party. Both parties being equally guilty of a violation of the law, they must abide the consequences, and not ask the courts to give to such a contract the sanction

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of their approval by affording a remedy to either. The court, having found that this contract was made on Sunday, rendered the proper judgment of a dismissal of the complaint with costs.

By the Court.—The judgment of the circuit court is affirmed.

CAIRNCROSS, Respondent, vs. THE VILLAGE OF PEWAUKEE and others, Appellants.

September 28 — October 17, 1893.

Municipal corporations: Obstruction in street: Steamboat placed there to be launched: Frightening of horse: Liability of village and of owners of boat: Contributory negligence: Concurrent cause: Notice of injury.

1. The owners of a small steamboat drew it to the edge of a lake for the purpose of launching it, and left it, about 5 o'clock P. M., in such a position that it extended about half way across a village street. About 10 o'clock the next morning plaintiff was driving along the street, and led his horse past the boat without injury. The owners were then engaged in launching the boat. About an hour and a half later plaintiff returned, and when he attempted to lead his horse by the boat, which was still in about the same position, the horse, being frightened by it, plunged and finally broke the bit and ran away and was injured. In an action against the village and the owners of the boat, the evidence is *held*, as against such owners, to sustain findings of the jury to the effect that the boat was not launched with reasonable care and promptness, and that, as left in the street, it was an object naturally calculated to frighten horses of ordinary gentleness.
2. The fact that plaintiff, when returning, might have passed around the boat by taking another road about a mile and a half longer, was properly excluded from the consideration of the jury upon the question of contributory negligence; and they were properly instructed that they were not to consider the fact that plaintiff knew of the obstruction when he first passed it, except that such fact held him to a greater degree of care in passing it again.

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3. The jury were also properly instructed not to take into consideration the fact that the bit broke.
4. A failure to give the notice required by sec. 1339, R. S., to be given to the village, is no defense for the owners of the boat, who were the active agencies in placing the obstruction in the street.
5. The owners of the boat had the right to place it where they did for the purpose of launching it, and it did not become a public nuisance until it *unnecessarily* impeded or incommoded travel upon the street, that is, until the owners had failed to launch it with reasonable promptness; and the village is not liable, therefore, unless, after the boat had so become a nuisance to the knowledge of its officers, they failed to abate it with reasonable diligence.

APPEALS from the Circuit Court for *Waukesha* County.

The complaint alleges, in effect, the incorporation of the defendant village and its duties with respect to streets therein; that April 26, 1889, the defendants Zaun, *Flannigan*, and *Hengel* negligently, carelessly, and unlawfully placed partially across Main street, adjoining the lake in said village, a steamboat belonging to them, forty-eight feet in length, ten feet in width, and ten or fifteen feet in height, at a place in said street where the same was not more than forty-five feet in width inside the walks; that the defendant village knowingly, carelessly, and negligently authorized, allowed, and permitted said street to become so obstructed by said boat; that April 26, 1889, towards noon of that day, the plaintiff was driving an ordinarily gentle horse with a wagon along and upon said street, unaware of danger, and without fault or negligence on his part, when his horse was frightened by said boat and rendered unmanageable, and broke away from the plaintiff and ran away, breaking his leg and rendering him absolutely worthless, and breaking and injuring his wagon and harness, and in consequence he sustained damage to the amount of $250; and that he had given the statutory notice of such defect, May 30, 1889. Judgment is demanded for the amount of such damage.

The village separately answered by way of admissions

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and denials, and alleged contributory negligence on the part of the plaintiff, and that, if any liability arose by reason of the facts alleged in the complaint, its codefendants alone were liable therefor. The defendants Zaun, *Flannigan*, and *Hengel* also answered by way of admissions and denials, and alleged contributory negligence on the part of the plaintiff.

At the close of the trial the jury rendered a special verdict to the effect that the boat reached the place where it was launched at 5 o'clock P. M. of the day prior to said accident; that the officers of the village had notice or knowledge of the presence of the boat at the time it reached that place; that the boat was not launched with reasonable care, promptness, and expedition; that the boat, as left in the street, was an object naturally calculated to frighten horses of ordinary gentleness; that no assistance was offered to the plaintiff when he passed the boat at the time of the accident; that the defendant Zaun was not one of the owners of the boat; that the fair value of the horse at the time of the accident was $125; and that the plaintiff was not guilty of negligence in passing the boat which contributed to the injury. Thereupon the court ordered that the plaintiff have and recover of all the defendants, except Zaun, judgment in accordance with the special verdict for the sum of $125 damages, and for costs. From the judgment entered accordingly, the said village separately appeals, and the said *Flannigan* and *Hengel* also appeal.

Warham Parks, for the appellant village.

For the appellants *Hengel* and *Flannigan* there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*, They contended, *inter alia*, that it was error to instruct the jury that they must not consider that there was another way by which plaintiff could have returned. *Thompson v. C., L. & C. R. Co.* 54 Ind. 197; *Mount Vernon v. Dusouchett*, 2 id. 586; *Clayards v. Dethick*, 12 Q. B. 439.

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For the respondent there was a brief by *Williams & Robinson*, and oral argument by *O. T. Williams*. They argued, among other things, that the question of contributory negligence was fairly submitted to the jury. They were told that plaintiff's knowledge of the obstruction made it necessary for him to exercise the greater care in passing it. That is all the law requires. *Omaha v. Ayer*, 32 Neb. 375. Walking upon a sidewalk known to be in a dangerous condition does not constitute negligence *per se*. *Sandwich v. Dolan*, 141 Ill. 430; *Phillips v. Huntington*, 35 W. Va. 406.

CASSODAY, J. The defendants *Flannigan* and *Hengel* owned the boat, and were the active agencies in placing it with one end in or near the water of the lake, and the other about the middle of Main street, about 5 o'clock in the afternoon of April 25, 1889. There appears to have been sufficient space between the end of the boat and the other side of the street for teams to pass and repass. The boat remained in that position all night and a good share of the next day. About 10 o'clock in the forenoon of April 26, 1889, the plaintiff led the horse in question along that street past the boat, without injury, and then drove for a distance of about two and a half miles toward the north, where he had some business to do. At the time he so passed the boat, going north, the men named were engaged in launching it. He returned about half past 11 o'clock that same forenoon, and his wife with him. The boat appears to have remained in substantially the same place as when he went north. As he approached the boat from the north, he and his wife got out, and he then took the horse by the bit, and again started to lead him by the boat, as he had going north. As he got opposite the boat with the horse, the latter plunged awhile, and finally the bit parted, and the horse got away from him and ran and was injured. Thus,

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it appears that the boat remained substantially as described for eighteen hours and a half before the injury, and that during that time it was in the charge of the owners and their men.

The findings of the jury to the effect that the boat was not launched with reasonable care, promptness, and expedition, and that, as left in the street, it was an object naturally calculated to frighten horses of ordinary gentleness, seem to be sustained by the evidence, so far as they apply to *Flannigan* and *Hengel*, and the charge of the court submitting such questions to the jury seems to be full and fair, and in no way prejudicial to the defendants *Flannigan* and *Hengel*. So, within the repeated adjudications of this court, the trial judge was justified in refusing to grant the nonsuit as to those two defendants, or to direct a verdict in their favor, and in submitting the question of the plaintiff's contributory negligence to the jury. *Richards v. Oshkosh*, 81 Wis. 228, and cases there cited.

Exception is taken because the court, in charging the jury upon the subject of the plaintiff's contributory negligence, said "that in considering that question you are not to take into consideration the fact, if it is a fact, that there was another road by which he might have passed round this obstacle or obstruction." This was said in view of the fact brought out on the cross-examination of the plaintiff by the counsel for the defendants, to the effect that the distance around by such other road was about a mile and a half. Under the authorities cited, the court was justified in charging the jury as he did. Exception is taken because the court charged the jury that "you are not to take into consideration the fact that the bit broke." This portion of the charge is fairly justifiable upon the rules stated by DIXON, C. J., in *Houfe v. Fulton*, 29 Wis. 304–306, and expressly sanctioned by Mr. Justice ORTON in *Olson v. Chippewa Falls*, 71 Wis. 562, 563. Exception is also taken

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because the court charged the jury to the effect that they were not to take into consideration the fact that the plaintiff knew of this obstruction when he passed it going north, a couple of hours before, except that the fact that he so knew held him to a greater degree of care and caution in passing it than if he had not known it. We find no error in such charge.

Error is assigned because the plaintiff was allowed to prove by the witness Bloar, in effect, that in passing the boat on the evening of April 25, 1889, with a double team, no one there offered to assist him in getting his team by the boat. This testimony only bore upon the fifth question submitted to the jury, and they found that no assistance was offered to the plaintiff when he passed the boat at the time of the accident; and the evidence appears to be undisputed that such was the fact.

The want of notice of the defect, required by sec. 1339, R. S., is not available as a defense for *Flannigan* and *Hengel*, who were the active agencies in placing the obstruction in the street. *Hughes v. Fond du Lac*, 73 Wis. 382.

We conclude that that portion of the judgment against *Flannigan* and *Hengel* must be affirmed.

But we are constrained to hold that the appeal of the village stands upon an entirely different footing. True, the jury find that the officers of the village had notice or knowledge of the presence of the boat at 5 o'clock on the evening prior to the accident; but the boat was then in charge of its owners, who were manifestly engaged, at least apparently, in launching the same. The law did not require such officers to assume, in advance, that such owners would not do their duty with respect to launching the boat. The same was true the next morning, when such owners were still apparently engaged in launching the boat. None of the village officers had been an active agent in

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placing the boat where it was at the time of the accident. They were, at most, passive observers as to what had transpired respecting the boat. There is no claim that the street itself was defective, otherwise than by the presence of the boat. The boat does not appear to have been left unattended, to the knowledge of any of the village officers. It is unlike the case of the street itself becoming defective, to the knowledge of the road authorities, by reason of a sudden hole in the street or a broken plank in a bridge. The defect here consisted in bringing from a distance an unusual object, and placing the same on the street in a manner naturally calculated to impede travel and frighten horses of ordinary gentleness. In the language of Mr. Elliott: "Any unauthorized obstruction which *unnecessarily* impedes or incommodes the lawful use of a highway is a public nuisance *at common law*." Elliott, Roads & S. 477, and numerous cases there cited. The court charged the jury to the effect that the owners had the right to draw the boat over the highway as they did, and to place it where they did, for the purpose of launching the same. The presence of the boat, therefore, did not become a public nuisance until it *unnecessarily* impeded or incommoded travel upon the street. The boat became such public nuisance only after the owners had failed to launch the same "with reasonable care, promptness, and expedition." True, the question of such reasonable necessity is ordinarily for the jury. The right to so hinder or obstruct travel is by no means absolute or continuous. It is, at most, temporary. It depends upon the necessity, and the necessity may depend upon the size and weight of the object handled, the duration of the obstruction, and perhaps other circumstances. *Jochem v. Robinson*, 66 Wis. 642, and cases there cited. Such being the law applicable, it is obvious that the village officers were not required to interfere until, to their knowledge, the delay of the owners to launch the same had

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become unreasonable; and then, after that, such officers would only be required to launch the boat with reasonable care, promptness, and expedition. There is an absence of any evidence in the record to hold the village liable on the theory mentioned.

By the Court.— That portion of the judgment which is against *Flannigan* and *Hengel* is affirmed; that portion of the judgment which is against the village is reversed; and the cause is remanded for a new trial upon the issues between the village and the plaintiff.

HOFFMAN, Appellant, vs. JOACHIM, Respondent.

September 28 — October 17, 1893.

Wills: Mental capacity: Undue influence: Husband and wife: Evidence: Immaterial error.

1. Findings sustaining a will against objections on the ground of mental incapacity and undue influence, are *held* to be supported by the evidence.
2. Where a husband is offered as a witness on behalf of his wife, the matter, if any, upon which he is a competent witness should be stated in the offer.
3. The exclusion of admissible evidence which could not have changed the result is not a material error.

APPEAL from the Circuit Court for *Ozaukee* County.

Probate of will. The facts are sufficiently stated in the opinion.

For the appellant the cause was submitted on the brief of *Eugene S. Turner.*

James F. Trottman, for the respondent.

WINSLOW, J. The appellant contests the probate of the will of one Henry Christian on the ground of mental in-

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capacity and undue influence. The will was admitted to probate by the county court, and upon appeal this judgment was affirmed in the circuit court. A jury was called in an advisory capacity in the circuit court, but on the conclusion of the testimony the circuit judge excused the jury and made findings sustaining the will.

We have read the testimony, and are satisfied that the circuit judge was entirely right in his disposition of the case. It is entirely unnecessary to detail the evidence.

The contestant offered her husband generally as a witness, and an objection thereto was sustained. This ruling was right. If there was any matter upon which the husband was a competent witness, it should have been stated when the offer was made. *Blabon v. Gilchrist*, 67 Wis. 38. Numerous exceptions were taken to rulings of the court excluding evidence. Possibly some of the questions should have been answered, but, even if answered favorably to contestant, they could not change the result. No discussion of them is necessary.

By the Court.— Judgment affirmed.

THE STATE EX REL. HOLT LUMBER COMPANY, Respondent, vs. BELLEW, Appellant.

September 29 — October 17, 1893.

(1) *Taxation: Sawlogs, where to be assessed.* (2) *Constitutional law: Uniformity in rule of taxation.* (3) *Jurisdiction of taxing officers: Estoppel.* (4) Certiorari: *Costs against city clerk.*

1. Under sec. 2, ch. 473, Laws of 1891, all sawlogs cut within six months prior to April 1st were to be assessed in the assessment district in which they were banked or piled, except logs which were to be sawed or manufactured in a mill in this state owned by the owner of such logs; and such logs could be brought within the operation

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of the exception only by a strict compliance with the proviso following the exception in said section.

2. Said act, so construed, was not in violation of sec. 1, art. VIII, Const., which provides that "the rule of taxation shall be uniform;" nor was it invalid because under it the owner might determine in what district his property should be taxed.

3. The fact that the owner of logs banked in one district listed them for taxation in another district in which his mill was located, did not give the taxing officers of the latter district jurisdiction over such logs if the affidavit and statement required by the proviso in said section were not filed with the assessor of the district in which the logs were banked; nor was the owner estopped thereby to assert the invalidity of the assessment of the logs in the district where they were so listed.

4. Where, upon a writ of *certiorari* directed to a city clerk, an assessment of certain property for taxation was held unlawful, costs were properly awarded against the clerk.

APPEAL from the Circuit Court for *Oconto* County.

This was a writ of *certiorari* to the clerk of the city of Oconto, to remove to the circuit court of that county the assessment of property, real and personal, of the said *Holt Lumber Company* in said city, and all statements, records, exhibits, evidence, and other matters used before the board of review, touching said assessment, to the end, among other things, that the assessment of 16,483,841 feet of sawlogs cut and banked by the relator in the town of Armstrong in said county, assessed and equalized at $4.50 per thousand, to wit, $74,177.28, be stricken from the assessment of the relator's personal property in Oconto for the year 1892.

It appeared from the return to the writ that the relator was a corporation engaged in the manufacture and sale of lumber at the city of Oconto, where its mills are located, and that it obtains its supply of logs for manufacture from different localities in Oconto and Marinette counties, and in part from the town of Armstrong in the county of Oconto; that during six months preceding April 1, 1891, it banked

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23,000,000 feet of pine sawlogs, intended to be manufactured at its mill in the city of Oconto, of which amount 16,483,841 feet were cut and banked in the town of Armstrong. On or about the 13th of June, 1891, it made and delivered to the assessors of the city of Oconto a statement of its personal property for taxation, in which was included the relator's entire stock of sawlogs for manufacture, including those cut and banked in the town of Armstrong, but failed to file, on or before the 15th day of June in that year, with the assessor of the town of Armstrong, where such logs had been banked and piled for shipment, an affidavit showing that it was the owner or owners of such logs, and that they were to be manufactured in its mill located in Oconto and operated by it, with a verified statement of the assessors of Oconto that the said logs were listed with them for assessment and assessed to the relator, giving the quantity of said logs so assessed; but by mistake, instead of the original affidavit and verified statement, left unsigned copies thereof, not showing that the originals had been verified or sworn to, at the house of the assessor, in his absence, on the 15th day of June, 1892.

The defendant moved to quash the writ of *certiorari*, and this motion was heard in connection with the merits as shown by the return. The main question was whether the said sawlogs were lawfully assessed to the relator in Oconto, as shown by the return. The circuit court made an order striking from the assessment of the relator's taxable property in Oconto for the year 1892 the 16,483,841 feet of sawlogs so assessed and equalized at $74,177.28, and gave judgment against the defendant, with $46.42 costs, from which the defendant appealed.

For the appellant there was a brief by *Fairchild & Fairchild*, and oral argument by *H. O. Fairchild.* They contended, *inter alia*, that the judgment for costs against the city clerk should be reversed. The writ was directed to

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him merely because he had in his possession the records and proceedings of the board of review. *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444. The costs, if any, should have gone against the city, and not against the clerk. *Oshkosh v. State ex rel. Perkins*, 59 Wis. 425; *Wiesmann v. Brighton*, 83 id. 550.

For the respondent there was a brief by *Greene & Vroman*, and oral argument by *Geo. G. Greene.*

PINNEY, J. 1. The principal question in this case depends upon the construction to be placed upon sec. 2, ch. 473, Laws of 1891, amending sec. 1040, R. S., and the several acts amendatory thereof, relating to the assessment of taxes, and concerning the place where personal property shall be taxed. The act of 1891 appears to be a revision and amendment of previous legislation in respect to the district in which personal property shall be assessed and taxed. The particular section in question declares that: "*All sawlogs* . . . cut in this state within six months prior to the first day of April of any year shall be assessed in the assessment district where the same shall be banked or piled for driving or shipment either by water or railroad, *except* that sawlogs and timber which are to be sawed or manufactured in any mill within this state, which is owned by the owner of such logs or timber, shall be assessed as manufacturer's stock *in the district where such mill may be located; provided* such owner or owners shall, on or before the 15th day of June of each year, file with the assessor in the assessment district where such logs are banked or piled as aforesaid, an affidavit showing that he is, or they are, the owner or owners of such logs or timber, and that said logs and timber are to be manufactured at a mill located within this state, owned and operated by him or them, giving the location and assessment district in which said mill is located, together with a verified state-

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ment of the assessor of the district in which said mill is located, that said logs or timber are listed with him for assessment and assessed to such owner or owners, giving the quantity of such logs and timber so assessed."

As already observed, the act of 1891 is a revision and amendment of all previous acts on the subject of the assessment and taxation of sawlogs. The act makes the *situs* of *all* sawlogs cut and banked within six months before the 1st of April in any year, for assessment and taxation, the assessment district where the same shall be banked or piled for shipment, etc.; and this general declaration is subject to only one exception, as above stated, and such sawlogs are brought within the operation of the exception in the act only by complying with the terms of the proviso following the exception. The place of assessment and taxation of the logs in question was primarily in the town of Armstrong, where they had been banked and piled for shipment. They might conditionally be assessed as manufacturer's stock in Oconto,— that is to say, if they were to be sawed or manufactured in any mill owned there by the relator, the owner of the logs,— provided the specified affidavit and verified statement were filed with the assessor of the said town of Armstrong, where they were banked or piled for shipment, within the time prescribed by the act. Until then the property was to be regarded simply as sawlogs assessable in the town of Armstrong, but if the proviso annexed to the exception was complied with, then, for the purposes of assessment and taxation, the logs obtained thereby the character of manufacturer's stock, and another *situs* for the purpose of assessment and taxation.

The statute in question was plainly intended to change the law as it had existed since 1872, and remedy a defect in it. Prior to the act of 1891 the assessor of a town where logs, etc., had been banked and piled for shipment had to judge, as best he might, whether they were intended for

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sale in the general market, or for manufacture in some mill in the state, owned by the owner of the logs; and in like manner the assessor of the assessment district where such mill was situated had to exercise a very uncertain judgment as to what quantity of logs, and what logs belonging to its owner, had been banked and piled in other districts to be shipped to and manufactured in such mill. By reason of a want of information and means to form a correct judgment, large quantities of property might be assessed in the wrong district, or wholly escape assessment and taxation.

The law is a very plain and just one, and easy of execution. As to logs designed to be manufactured in this state in a mill owned by the owner of the logs, on filing the affidavit of the owner and the verified statement of the assessor of the district in which the mill is situated, the assessment in such district becomes absolute, and any assessment of the same logs in the town where banked or piled for shipment is superseded and vacated. Giving the act this construction, the owner of the logs is protected against double assessment, and it is made reasonably certain that the logs will not escape taxation. It is a forced and unnatural construction to say that logs to be sawed or manufactured in any mill in this state owned by the owner of such logs are primarily assessable in the district where such mill is situated. Such logs are excepted out of the provision which makes *all* logs banked and piled in any other district for shipment subject to assessment therein; but such exception is upon condition, and until the condition is performed the operation of the rule which makes them assessable in the district where banked or piled for shipment applies, and the only way in which the jurisdiction of the taxing officers of the town of Armstrong could be defeated, and jurisdiction conferred on the taxing officers of Oconto, was by a strict compliance with the proviso,

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which is a substantive part of the exception contained in the act. This proviso, it is clear, was not intended to have a broader operation, or to make logs designed to be manufactured as specified in the act primarily assessable in the district where the mill of the owner is situated. "There is no rule of construction more reasonable, and none better settled, than that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. This rule is thus stated in Dwar. Stats. 658: 'Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.'" *State ex rel. Lutfring v. Goetze*, 22 Wis. 365. But it is obvious that the exception can operate and be effective only according to its terms, of which the proviso in this case is an inseparable part. A proviso "is a limitation or exception to a grant or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided." Sedg. Stat. Const. 49; *Voorhees v. Jackson ex dem. Bank of U. S.* 10 Pet. 449; *Wayman v. Southard*, 10 Wheat. 1, 30. The natural and appropriate office of a proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It should be construed with reference to the immediately preceding parts of the clause to which it is attached, and will be so restricted, in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect. Suth. Stat. Const. § 223, and cases cited.

2. It is essential to the exercise of the power of taxation that the state shall be divided into taxing districts, and property into classes, and it is enough that the rule of taxation as to each class shall be uniform. *Green Bay & M.*

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Canal Co. v. Outagamie Co. 76 Wis. 588; *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 142. We see no reason to think that the statute, as we have construed it, is violative of the uniform rule of taxation prescribed by the constitution. Whether it is a wise provision or not is not a judicial question; that question is wholly a legislative one. We do not consider that the objection that the relator had it in its power to determine under the law in what district the property in question should be taxed is available. By change of residence, or of location of property having a certain character, a similar power has always been open to the owner. The objection goes only to the wisdom, and not to the validity, of the act.

3. As we hold that the assessment of the logs in Oconto could not become operative in law until the prescribed affidavit and statement had been filed with the assessor of the town of Armstrong, so as to oust the taxing officers of that town of jurisdiction over the property, and as it would be unreasonable to construe the statute as permitting double assessments, we think it entirely clear that the taxing officers of Oconto never acquired jurisdiction over the logs to assess and tax them. The relator could defeat the jurisdiction of the taxing officers of the town of Armstrong only by complying with the law. The copy of the affidavit filed with the assessor did not show or indicate that the original had been signed or sworn to, but rather the contrary; and the same is true of the statement of the assessors of Oconto. The statute must be strictly complied with, in order to give the taxing authorities of Oconto jurisdiction. The papers filed, for the reasons stated, were mere nullities, and it is fairly to be presumed that the taxing officers of Armstrong proceeded to do their duty and to assess and tax the property. We do not think any case is presented on the ground of estoppel to subject the relator's property to assessment and taxation in Oconto, and

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possibly to double taxation. The taxing officers of Oconto were chargeable in law with notice that their jurisdiction depended upon the necessary affidavit and statement being seasonably filed with the assessor of Armstrong, and it does not appear that the relator made any untrue statement or representation on that or any other material point, or that he in any way misled the taxing officers of the city of Oconto.

4. There was no error in awarding costs against the defendant. R. S. sec. 2926; *State ex rel. School Dist. v. Wolfrom*, 25 Wis. 476.

We find no error in the judgment appealed from.

By the Court.— The judgment of the circuit court is affirmed.

BRUNETTE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 29 — October 17, 1893.

Railroads: Accident at highway crossing: Contributory negligence.

It is the duty of a traveler on a highway crossed by a railroad track, if he approaches the crossing when a moving train in close proximity thereto is also approaching it, to wait for the train before he crosses the track, and his failure to do so is negligence.

APPEAL from the Circuit Court for *Brown* County.

Action to recover damages for injuries alleged to have been caused by the negligence of defendant railway company. The facts are as follows: Broadway and Pearl streets, in the city of Ft. Howard, are parallel north and south streets, separated by the width of one block. The railroad of defendant company is laid along Pearl street for a distance of several blocks, when it diverges therefrom and crosses Broadway. At about 6 o'clock on the evening

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of October 21, 1891, plaintiff drove his mare, harnessed to a cart in which he and his daughter were riding, along Broadway south towards the railroad crossing. At a point several blocks north of the crossing he saw a train of cars on the railroad going in the same direction. Although plaintiff drove his mare at a rate of speed, as he estimates, better than a mile in three minutes, the train passed him. It slowed for another railroad crossing, and the plaintiff passed it. Although the speed of the train was increased after passing such crossing, plaintiff kept in the lead. As he approached the Broadway crossing the speed of the mare slackened to a mile in three and a half or four minutes. When within forty or fifty feet of the crossing one wheel of his cart was broken down by a collision with a delivery wagon, which was being driven furiously from the other direction. Plaintiff stopped his mare as soon as he could, but not until she was on the railroad track. The train reached the crossing at the same time, and struck and killed the mare, damaged the cart and harness, and bruised the plaintiff.

This action is to recover damages for such injuries. On the trial the court refused to direct a verdict for defendant, and submitted to the jury all questions of negligence. The jury found for the plaintiff, and assessed his damages at $525. Defendant appeals from the judgment against it, entered pursuant to the verdict.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

For the respondent there was a brief by *Cady & Huntington*, and oral argument by *F. C. Cady*.

LYON, C. J. We held in the case of *Dullea v. C. & N. W. R. Co.*, *ante*, p. 173, that it is the duty of the traveler on a highway crossed by a railroad track, if he approaches

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the crossing when a moving train in close proximity thereto is also approaching it, to wait for the train before he crosses the track, and that his failure to do so is negligence. That judgment rules the present case. Indeed, this is the stronger case of the two against plaintiff, for plaintiff in that case was embarrassed by the nervousness of his horse, and thought it the safer and better course to get him over the crossing ahead of the train, while no reasonable excuse appears for the attempt of the present plaintiff thus to cross the track. He denies that he was racing with the train, but it is certain that he was testing the speed of his mare by that of the train, with the fixed purpose of reaching and crossing the railroad track in front of it. From this purpose he did not swerve for a moment until his cart was wrecked by collision with a delivery wagon, and then it was too late to recede. That collision does not help the case of plaintiff. His duty required him to stop at a safe distance from the crossing before the train passed. This he failed to do. The collision was within forty or fifty feet of the crossing, and the momentum of her high speed carried the mare upon the track in two or three seconds thereafter. Had plaintiff exercised due care, and stopped his mare when he should have done so, probably no collision with the delivery wagon would have occurred, and, had it occurred, plaintiff, with his mare and cart, would not have been precipitated on the railroad track.

Plaintiff testifies that just before the collision he saw the train and thought it four or five hundred feet away from the crossing. It is argued that if the jury believed the train was that distance in the rear of plaintiff they might properly acquit him of negligence in attempting to make the crossing in front of it. There is no sufficient evidence, notwithstanding plaintiff's estimate of the distance, to support a finding that the train was one half that distance from the crossing when the delivery wagon collided with

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plaintiff's cart. The proof is abundant and convincing that, at a point less than 300 feet from the crossing, plaintiff and the train were nearly opposite each other. But, however this may be, if the train was apparently four or five hundred feet away from the crossing when plaintiff was forty or fifty feet therefrom, we still think that it was plaintiff's duty to stop and let the train pass. If men will take such risks as plaintiff here took, they must be left to suffer the consequences if disaster results. Such negligence sometimes causes the wrecking of railroad trains and the destruction of life and property, and the whole public has a vital interest in maintaining in their vigor all rules of law ordained to avert such disasters. These rules should never be relaxed by the courts.

We hold that it is conclusively proved that plaintiff was guilty of negligence which contributed directly to the injuries of which he complains. This defeats his action, and it becomes unnecessary to determine whether the railroad company is chargeable with negligence. The court should have directed a verdict for defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

NEUBAUER and another, Appellants, vs. GABRIEL, imp., Respondent.

September 29 — October 17, 1893.

Lease of chattels: Mortgage by lessee: Estoppel.

1. A father purchased personal property and immediately leased it to his son, who had been present and had selected the property when the purchase was made. The son took possession under the lease, and while so in possession mortgaged the property to persons who had given him credit on the faith of his ownership thereof. Afterwards

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the father took possession, terminating the lease, as by its terms he was authorized to do. In replevin by the mortgagees against the father, it is *held* that the son had no right to give the mortgage, and that the father, not having said or done anything to mislead the mortgagees or induce them to give credit to the son, was not estopped to claim the property.

2. Assuming that the mortgage operated as an assignment of the son's interest in the lease, yet the mortgagees took subject to the terms of the lease and were thereby estopped to deny the lessor's title.

APPEAL from the Circuit Court for *Brown* County.

Replevin. The defendant *Chislain Gabriel* is the father of the defendant John Gabriel. About January 1, 1892, *Chislain* mortgaged his farm and raised $800, and through the agency of his daughter bought the personal property in question, to be placed in the Arlington Hotel in De Pere, and the same was placed therein, with the view of leasing the same to the said John. On January 2, 1892, the said *Chislain* did lease said personal property then situated in said hotel to the said John for the term of two years, with the privilege of two additional years, at an annual rent of $60. In March, 1892, said *Chislain* got said personal property insured in his own name and for his own benefit, and paid therefor a premium of $18. On May 21, 1892, while the said John was in possession of said property under said lease, running said hotel, he mortgaged the said personal property to the plaintiffs to secure the payment of $250, and such mortgage was filed May 24, 1892. In July, 1892, *Chislain* took possession of said personal property and said hotel, and retained the same until replevied in this action. Soon after *Chislain* took possession of said hotel, the said John left. About November 1, 1892, the plaintiffs demanded the possession of said property under their said chattel mortgage, which *Chislain* refused to deliver, and thereupon, on November 3, 1892, the plaintiffs commenced this action of replevin to recover said personal property described in said lease and said chattel mortgage. *Chislain*

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defended on the ground that John had no interest in the property except as such lessee, and that said personal property belonged to him, the said *Chislain.*

Upon the trial the court found, in effect, in addition to the facts stated, that *Chislain* did not wrongfully detain said personal property nor any part thereof; that the plaintiffs were not entitled to the possession of said property by virtue of said chattel mortgage or otherwise, and were not the owners thereof; that said *Chislain* is and was at all times the owner of said personal property, and is entitled to the possession of the same; that the value thereof was $250, and that the defendant not having waived in his answer claim to return of the property, and in open court waived the return of the same, it was and is determined that *Chislain* is entitled to recover the value thereof, and damages for the detention thereof, in the sum of $4.15, being the interest on said value from November 3, 1892. At the instance and request of the plaintiffs the court further found, as matters of fact, that John, for four months next preceding the date of the chattel mortgage, was in the actual possession of said hotel and the furniture therein, and was in the control and management thereof, carrying on the business in his own name, with the knowledge and consent of said *Chislain*, but that the said *Chislain* was the owner of the property, having leased the same to the said John; that the plaintiffs, respectively, furnished the said John with meat and groceries for said hotel to the amount named, on the credit of said John, and believing and relying upon the fact that said John was the sole proprietor of said hotel and the property therein, and the sole owner thereof; and that said indebtedness secured by said chattel mortgage accrued before the commencement of this action; that neither of the plaintiffs had any knowledge or information that said personal property or any part of it belonged to or was claimed by *Chislain* until after said in-

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debtedness had accrued; that the plaintiffs demanded possession, and the same was refused, as stated.

And as conclusions of law the court found that the said *Chislain* is entitled to a judgment herein for the value of said personal property, and interest from November 3, 1892, as damages, assessed and allowed by the court at $4.15, and such judgment to be entered as well against the plaintiffs as their sureties on the replevin bond, for the sum of $254.15, and costs and disbursements of this action. From the judgment entered thereon accordingly, the plaintiffs appeal.

For the appellants there was a brief signed by *John Smith* and *Ellis & Merrill*, attorneys, and *E. H. Ellis*, counsel, and oral argument by *E. H. Ellis*.

Thomas R. Hudd, for the respondent.

CASSODAY, J. It is pretty clearly established that the father, *Chislain*, raised $800 by mortgaging his farm, and then, through the agency of his daughter, Mary, purchased the property in question for himself, but with the purpose of leasing the same to his son, John, and thus starting him in the hotel business, as mentioned in the foregoing statement. Soon after the property was so purchased, the father procured an insurance thereon for his own benefit. The lease was given, as stated, and is in the ordinary form. The lease runs to the son directly, and to no one else. By its terms the son was expressly required to keep the property leased in repair, and was expressly prohibited from underletting the same without the consent of the father; and the father was thereby expressly authorized to terminate and cancel the lease, and to take the property covered by it from the possession of the son and from the hotel, upon any failure of the son to pay the rent at the time expressed in the contract, or in case he should underlet the property so leased without the consent of his father. The father did enter and take such possession of the prop-

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erty, and thus terminated the lease, and held the same for more than three months prior to the commencement of this action, as mentioned in the foregoing statement. True, the son had given the chattel mortgage to the plaintiffs prior to the time his father had so taken possession; but the lease gave to the son no power, right, or authority to sell or mortgage the property therein described, or any part of it. Assuming that such mortgage was, in legal effect, an assignment of the son's interest in the lease, yet such assignees were compelled to take such assignment subject to all the equities between the original parties, and were bound to perform all the agreements therein contained and annexed to the property so leased. *Martineau v. Steele*, 14 Wis. 272; *Wittman v. M., L. S. & W. R. Co.* 51 Wis. 91; *Gordon v. George*, 12 Ind. 408; *McDowell v. Hendrix*, 67 Ind. 518; *Patten v. Deshon*, 1 Gray, 325. But, if the plaintiffs be regarded as assignees of the lease, then they were bound to know the terms and contents of the lease, and were subject thereto, and were thereby estopped from disputing the father's title as such lessor. *Barroilhet v. Battelle*, 7 Cal. 450. But the plaintiffs have not claimed the possession of the property under the lease, as assignees thereof, but as legal owners of the property, entitled to the absolute possession thereof as such owners. The cause of action alleged and sought to be maintained ignores any title to the property in the father as lessor, and predicates the right to recover on the theory that the son, by virtue of his possession, had the right to transfer to the plaintiffs the absolute and complete title to the property, discharged of any right or claim of the father thereto, as such lessor. Certainly, the son had no authority to make such transfer by virtue of such lease.

Counsel for the plaintiffs contend that the father is estopped by his conduct from claiming the property, independent of the lease. Certainly, the father, as lessor, lost

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none of his rights by merely allowing his son, as lessee, to go into possession; otherwise, any lessor of chattels would be in danger of losing his property. One of the objects of every lease is to secure possession to the lessee.

The only other matter calling for consideration is the fact that at the time the father, through the agency of his daughter, Mary, bought and paid for the furniture and goods to be placed in the hotel and to be leased to the son, the son was present and selected the same. The good faith and genuineness of the whole transaction, so far as the father is concerned, are abundantly established by the evidence and findings of the court. The mere fact that such purchase was made by the father just before giving the lease gave the son no more right to dispose of the property than if the father had owned the property for months or years prior to giving the lease. The father neither said nor did anything to mislead the plaintiffs or either of them, or to induce them or either of them to give credit to the son. The case is entirely unlike one where the person in possession of chattels or goods is clothed with the apparent authority to sell and give an absolute title to the property. We must hold that such mere presence of, and selection by, the son, at the time of the purchase, and his subsequent possession of the property so purchased, under and by virtue of the lease, did not estop the father, as lessor, from claiming the property, as against the son's subsequent creditors and mortgagees. We fully recognize the equitable rule invoked by counsel for the plaintiffs, to the effect that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent. That doctrine, however, always presupposes mistake or error on the one side, and fault, deceit, or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. In the case at

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bar, it does not appear that the father was ever silent as to his alleged rights when he ought, in good faith, to have spoken. *Morgan v. Pierron*, 64 Wis. 523; *Walker v. Grand Rapids F. M. Co.* 70 Wis. 92. In *Johnson v. Crofoot*, 53 Barb. 574, seemingly relied upon by counsel, the property in controversy belonged to the lessee, and the only claim the lessor's assignee had to the same was by virtue of a clause in the lease in the nature of a chattel mortgage; and it was held that as the lease was never filed as a chattel mortgage, as required by the statute, he had thereby lost his security, as against an execution creditor of the lessee. Of course, a lessee may sell or incumber his own property. *Colville v. Miles*, 127 N. Y. 159.

By the Court.— The judgment of the circuit court is affirmed.

PETERSON, Respondent, vs. NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

September 29 — October 17, 1893.

Railroads: Fences: Killing of horses on track: Contributory negligence.

To the plaintiff's knowledge, four or five rods of the fence between his yard and defendant's track had been broken down for several months, and the opening had been used as an entrance to the yard. His horses were turned loose in the yard by an employee who had been instructed to watch them to see that they did not get upon the track. The yard was about eighty feet wide, with good pasturage extending through the opening in the fence and upon defendant's right of way. While the employee's attention was diverted by other work the horses passed through the opening upon the track, and they were shortly afterwards killed by a passing train. *Held*, that plaintiff was guilty of contributory negligence.

APPEAL from the Circuit Court for *Ashland* County.

The case is stated in the opinion.

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For the appellant the cause was submitted on the brief of *D. S. Wegg* and *T. H. Gill.*

For the respondent there was a brief by *Rossman & Foster*, and oral argument by *O. H. Foster.*

ORTON, J. This action is brought by the plaintiff against the appellant company to recover damages for the killing of his two, or a span of, horses, on the night of June 13, 1892, by a freight train, caused by the negligence of the company in leaving open the fence of its right of way, through which the horses had strayed upon its track. The following facts substantially appear from the evidence:

The plaintiff owned and occupied a large yard, situated a mile or a mile and a half south of the city of Ashland, the west side of which was on the line of the railroad. It was fenced on the three sides with a wire fence, and on the west side by the wire fence along the right of way built by the company. In this yard was a slaughterhouse, barn, and dwelling house. The barn was facing towards the railroad, and about sixty or seventy feet from the fence; and in front of the barn the wire fence along the right of way, for four or five rods, was broken down from the posts, and lay on the ground, and this was its condition when the plaintiff bought the premises, about six months before, and had so continued. Through this opening the plaintiff had driven several times, and his foreman had driven cattle through it, and many other people had used it in going to the slaughterhouse. This opening had existed most of the time for several years. It had been many times repaired by the company, but very soon it was torn down again by some persons unknown. The plaintiff and others had used it in driving to the slaughterhouse, and it was often used as one of the entrances to the yard. The foreman of the yard or head butcher had used the team of horses that were killed that afternoon, and turned it over to an em-

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ployee of the plaintiff, to be put in the barn, with the caution that if he turned them out to feed on the grass he must *watch* them and see that they did not go upon the right of way; and the plaintiff had told his men that if they were so turned out they must be *watched*, for the same purpose. The said employee, however, about 8 o'clock in the evening, when it was quite dark, turned the horses out in front of the barn and opposite said opening to graze on the high grass which was growing there, and which extended all along through the opening and in the right of way, and he kept watch of them a few minutes, and then for a minute or two his attention was somewhat diverted by fixing the barn door, and when again he looked the horses were gone, and he and the foreman tracked them through the opening and along the right of way to the place where they were killed by the freight train of the company that had just passed along.

These are the plain and undisputed facts of the case. The jury found that the defendant was guilty of negligence contributory to said injury, and that the plaintiff was *not* guilty of negligence contributory to such injury, and that the value of the horses was $450. The defendant has appealed from the judgment thereon, and has assigned as error that the court did not grant a new trial on the ground that the verdict is against the evidence and contrary to law.

We do not hesitate to say that the trial court ought to have granted the motion for a new trial on the ground that the verdict is contrary to the evidence in finding the plaintiff not guilty of contributory negligence. This appears to be one of the clearest cases of contributory negligence on the part of the plaintiff to be found in the books. The plaintiff turned his horses out to grass in the yard in front of his barn, only from seventy to eighty feet wide, opposite an opening four or five rods wide in the fence of the railroad, with unbroken good pasturage all the way through

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the opening and in the right of way to tempt them on and on to the very track of the railroad, where they would be likely to be killed by a passing train. The plaintiff had known of this wide break in the railroad fence for at least six months, had driven through it, and saw other people drive through it, to his slaughterhouse, and had evidently used it for his own convenience as an entrance to his yard. He so well knew the danger of his horses going through the opening on the railroad and of being killed there if they were turned out to graze in the yard in front of the barn, that he cautioned all of his employees to *watch them* and see that they did not go out into the right of way. At this time the employee was so cautioned, and did *watch them*, but his attention was diverted to some other work a minute or two, and, sure enough, just as the plaintiff had reason to expect and did expect, the horses were gone into the right of way and out of sight through this wide opening in the fence.

The plaintiff used this fence to fence in his own yard on that side, and he had no other. It was his line fence between his premises and that of the company. Perhaps the law did not require him to keep it repaired, but the law of self-preservation and protection would seem to require it. But, if not that, he certainly assumed the duty of watching his horses and preventing them from going through this gap in the fence which he was making otherwise so useful to himself and others as an open entrance to his yard. He knew the danger and assumed the risk. He ordered his men to watch them, but they did not watch them. They neglected this plain and necessary duty, and their negligence is imputed to him. The plaintiff should have watched them, or been sure that they were watched by some one. No ordinarily prudent and careful man would pasture his horses in such a place. He was certainly guilty of gross negligence in turning his horses out in such a place. The

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company had frequently repaired this fence by nailing the wires to the posts, and it was as frequently torn down by some one, until the company became discouraged, probably, and let it alone. There was no one who had any interest or motive to tear this fence down in that place unless he was in some way connected with this slaughterhouse yard. The plaintiff and his men, and those who drove cattle to his slaughterhouse, seem to have been willing to make use of this gap as an entrance to the yard. This is a much stronger and clearer case of the plaintiff's negligence than the following cases in this court, in which we have held that the plaintiff could not recover by reason of his contributory negligence in exposing his animals to a similar risk of being killed on the railroad: *Carey v. C., M. & St. P. R. Co.* 61 Wis. 71; *Martin v. Stewart*, 73 Wis. 553; *Richardson v. C. & N. W. R. Co.* 56 Wis. 347. The negligence of the plaintiff is so self-evident that the authority of other cases is not necessary.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

ARMSTRONG, Respondent, vs. PRENTICE, Appellant.

September 29 — October 17, 1893.

Contracts: Consideration: Fees of witness.

Attendance as a witness in an action pending in another state is a sufficient consideration for a promise to pay the witness more than the legal fees, since such attendance could not have been compelled.

APPEAL from the Circuit Court for *Ashland* County.

This action was brought to recover for services and expenses of the plaintiff in looking up witnesses and testimony

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in several actions in which defendant was a party, pending and tried in St. Paul, Minn. The actions involved the defendant's title to certain lands in the present city of Duluth, which plaintiff had attempted to convey to defendant by deed in 1856. The description in this deed being erroneous, the aforesaid actions had become necessary to establish defendant's title; and plaintiff claims that defendant employed him to look up records, testimony, etc., in these cases, and agreed to pay him the reasonable value of his time spent in such service and in attending the trials, as well as all his necessary expenses. The defendant claims that he only agreed to pay plaintiff his expenses, all of which he has already paid. The plaintiff's testimony tended to show that he had spent 125 days in looking up testimony and in attendance upon court, in and about the preparation of these cases, which he claimed to be worth the sum of $910, and that he had necessarily expended $500.10, and that he had received from defendant $210. The jury found a verdict for the plaintiff of $1,130.10, and from judgment thereon defendant appeals.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*. To the point that a promise to pay a person more than the legal fees for giving testimony is invalid, they cited *Bayley v. Beaumont*, 11 Moore, 497; *Collins v. Godefroy*, 1 Barn. & Ad. 950; *Sweany v. Hunter*, 1 Murph. 181; *Dodge v. Stiles*, 26 Conn. 463.

For the respondent there was a brief by *Rossman & Foster*, and oral argument by *O. H. Foster*. They argued that one's undertaking to do that which he is under no obligation to do is a good consideration for a contract to pay him therefor. *Harris v. More*, 70 Cal. 502; *Dodge v. Stiles*, 26 Conn. 463; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

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WINSLOW, J. There is little to be said in this case. The questions at issue were purely questions of fact, which the jury have settled upon what seems to us sufficient evidence and substantially correct instructions. It is objected that the plaintiff has recovered for attendance as a witness a sum largely in excess of legal fees, and that a promise to pay a witness more than legal fees for his attendance is void, because he is simply performing a legal duty. However this may be in a case where the attendance of the witness may be compelled by *subpœna*, it certainly does not apply in a case like the present, where the actions were pending in another state and the witness could not be compelled to attend. In the latter case, it is evident that there is sufficient consideration to support a promise to pay additional compensation.

By the Court.—Judgment affirmed.

NORTHERN NATIONAL BANK, Appellant, vs. WEED and another, Respondents.

September 30 — October 17, 1893.

Debtor and creditor: Several instruments held a general assignment with preferences.

An insolvent firm gave bills of sale, etc., covering the bulk of its property, to officers of banks to which it was indebted, taking back an instrument stating that such bills of sale, etc., were given as collateral securities for the payment of notes made or indorsed by the firm and held by said banks. The manifest purpose of the transaction being that said bank officers should sell the property and apply the proceeds on the several claims so held by the banks, respectively, *pro rata*, it is *held* to have been a voluntary assignment for the benefit of creditors, within the meaning of sec. 1694, R. S., and void because not executed as therein prescribed and because it gave an unlawful preference.

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APPEAL from the Circuit Court for *Ashland* County.

On September 4, 1890, and for some time immediately prior thereto, the firm of A. Weed & Co., composed of the defendants, was hopelessly insolvent. On that day the defendants executed and delivered to Thomas Bardon and Edwin Ellis instruments to the following effect: (1) A bill of sale in the ordinary form, with the usual warranty, and reciting a consideration of $25,000, for all the lumber and lath piled upon the docks of the Bay Shore Lumber Company at Ashland, and all the logs belonging to them situated at the boom of said company at Ashland and the booms of the Ashland Boom & Canal Company on Bad river, marked as therein designated; also (2) a bill of sale in the ordinary form, with the usual warranty, and reciting a consideration of $50,000, for about four and a half million feet of lumber, about two and a half million feet of logs, about two million shingles, about a half million lath, horses, cattle, and general logging outfit at Ramsay, Mich.; also (3) a warranty deed of their sawmill property at Ramsay, therein described; also (4) an assignment of a real-estate mortgage on the sawmill plant of the Bay Shore Lumber Company at Ashland, executed by that company to A. Weed & Co., September 4, 1890, for $12,000.

On the same day, and as a part of the same transaction, said Bardon and Ellis executed and delivered to the said A. Weed & Co. the following instrument, to wit: "Know all men by these presents that the bill of sale executed this 4th day of September, A. D. 1890, by A. Weed & Co. to Thomas Bardon and Edwin Ellis, on logs and lumber in Ashland county, and the bill of sale by *Alfred Weed* and *Paul Weed* for logs, lumber, lath, and shingles, and horses, cattle, and logging outfit on the same date, said property being in Gogebic county, Michigan, both hereto attached, and the deed executed on the same date and between the same parties on the sawmill property at Ramsay, Gogebic

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county, Michigan, on the southeast quarter of the northwest quarter of section 13, township 47 north, of range 46 west, and the assignment of the mortgage from the Bay Shore Lumber Company to A. Weed & Co. of $12,000, are given as collateral securities for the payment of notes made or indorsed by said A. Weed & Co., and held by the First National Bank of Ashland and the Ashland National Bank and the Security Savings Bank, all of Ashland, Wisconsin, to the amount of about $65,000."

These various instruments were filed and recorded in the proper offices, September 4, 1890. After the execution and the filing and recording of said several instruments, and on September 4, 1890, the plaintiff began this action against the defendants to recover $10,750, and sued out a writ of attachment pursuant to the statutes, on the ground that the plaintiff had good reason to believe, and verily did believe, that the defendants had assigned, conveyed, disposed of, or concealed, or were about to assign, convey, dispose of, or conceal, their property, or some part thereof, with intent to defraud their creditors. On the same day, under the writ of attachment issued thereon, a large amount of logs and lumber was levied upon.

The defendants, by way of special answer to the said affidavit and writ of attachment, denied the existence of all the material facts stated in said affidavit, except the alleged liability and the amount thereof. The plaintiff elected to take issue with said answer, and at the close of the trial of the issues thus formed the court found as matters of fact that the allegations of said affidavit were not true, and that none of the material facts stated therein existed, except as to the alleged liability of the defendants for the amount thereof; and as conclusions of law the court found that the defendants were entitled to an order delivering the property attached to the defendants, together with the costs of the trial of said issue, taxed at $25; and it was therefore there-

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upon ordered that the property attached and described in said writ of attachment and the return and inventory thereto annexed, be forthwith delivered up to the defendants, and that the sum of $25, taxed as costs therein, be applied as a setoff to the plaintiff's demand.

From the order sustaining the traverse of the affidavit for attachment, and from the whole and every part thereof, the plaintiff appeals.

For the appellant there were briefs by *Lamoreux, Gleason, Shea & Wright*, and oral argument by *E. F. Gleason.*

For the respondents there were briefs by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins.*

CASSODAY, J. It is conceded that at the time of executing the several instruments mentioned in the foregoing statement A. Weed & Co. were not indebted to Bardon and Ellis, or either of them, in any sum whatever; that the only connection Bardon and Ellis had with any claim against A. Weed & Co. was that Bardon was president of the Ashland National Bank, and a director in the First National Bank of Ashland, and that Ellis was president of the First National Bank of Ashland, and a director in the Ashland National Bank and in the Security Savings Bank of Ashland, and that A. Weed & Co. were indebted to said several banks in a large amount, as mentioned in said statement, and that the five several instruments mentioned in said statement were made, executed, and delivered for the sole use and benefit of said banks, respectively. It appears that just prior to executing the several instruments mentioned, A. Weed & Co. desired and were about to make a general assignment for the benefit of their creditors, but were dissuaded therefrom by Bardon and Ellis, and instead thereof, and at their suggestion, executed the several instruments mentioned. Those instruments covered the great mass of property belonging to A. Weed & Co., and were

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executed for the purpose of giving the banks named, respectively, a preference over their other creditors. A. Weed & Co. were hopelessly insolvent, and owed such other creditors, in the aggregate, a very large amount; and, if the transaction mentioned is to stand, it is certain that such other creditors can realize but a small per cent., if anything, on their claims. The manifest purpose of the transaction was for Bardon and Ellis to sell the property covered by the bills of sale and deed, and collect the mortgage, and apply the proceeds thereof on the several claims so held by the banks, respectively, *pro rata.* We are constrained to hold that the facts bring the case squarely within the rules of law affirmed by this court in *Winner v. Hoyt*, 66 Wis. 227; *Maxwell v. Simonton*, 81 Wis. 635; *Fuller & F. Co. v. McHenry*, 83 Wis. 573. These cases, and several others which are distinguishable, have discussed the principles involved fully and in detail. It is only necessary here to apply the plain language of the statutes to the case. "*All voluntary* assignments or transfers whatever of *any* real estate, chattels real, goods or chattels, rights, credits, moneys, or effects, *for the benefit of or in trust for creditors* shall be *void* as against the *creditors* of the person making the same, unless the assignee shall be a resident of this state," and the assignment is executed as therein required. Sec. 1694, R. S. Had A. Weed & Co. made such an assignment as they at first contemplated, it would, nevertheless, have been absolutely void had it contained or given any preference to one of their creditors over another creditor. Sec. 1693*a*, S. & B. Ann. Stats.; ch. 349, Laws of 1883; and ch. 451, Laws of 1887. A. Weed & Co. cannot be allowed to do by way of indirection and circumvention what the statutes thus prohibited them from doing directly.

The exceptions to the statutory rules thus stated, which from time to time have been sanctioned by this court, have either been cases not coming within the purview of the stat-

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utes cited, or where the instrument has been authorized by some other statutory provision; as, for instance, a chattel mortgage. Sec. 2314, R. S.; *Cribb v. Hibbard, Spencer, Bartlett & Co.* 77 Wis. 206; *Michelstetter v. Weiner*, 82 Wis. 298. This distinction was pointed out in *Maxwell v. Simonton*, 81 Wis. 635.

It may be said, as it has often been said in such cases, that this decision will operate to give a preference to an attaching creditor. But this court is not responsible for the anomalous provisions of our statutes on the subject. They manifestly prohibit an insolvent debtor from giving preferences in certain ways, and yet allow him to give preferences in certain other ways. The policy of the law on the subject is for the legislature. This court cannot do otherwise than to declare the law as it is found in the statutes.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with direction to sustain the attachment, and for further proceedings according to law.

PINNEY, J., took no part.

CHALLONER and another, Respondents, vs. BOYINGTON and another, Appellants.

September 30 — October 17, 1893.

Change of venue: Convenience of witnesses: Discretion: Appeal.

1. An order directing a change of the place of trial, under subd. 3, sec. 2622, R. S., on the ground that the convenience of witnesses and the ends of justice will be promoted thereby, will not be reversed except for a manifest abuse of discretion.
2. Where such an order is granted in a case which has once been tried, and the "records and files" upon which it was granted are not be-

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fore this court, and it does not appear what facts were within the knowledge and observation of the trial judge, this court cannot hold that there was an abuse of discretion.

8. Upon an application for such a change, the convenience of parties who are witnesses may be considered to the same extent as that of other witnesses.

APPEAL from the Circuit Court for *Price* County.

This action was brought in the circuit court for Price county to recover the first instalment due on a contract for the sale and delivery of certain machinery, and a judgment in favor of the plaintiffs was reversed, and the cause remanded for a new trial. 83 Wis. 399. In the mean time the plaintiffs brought a second action in the same court against the defendants for another instalment under the contract, and, issue having been joined, it was stipulated that the place of trial be changed to Fond du Lac county, and that the action be tried before the court without a jury, and the place of trial was changed accordingly. Soon thereafter, in this action, an order was granted to show cause, based on the affidavit of one of the plaintiffs' attorneys and the records and files of the case, why the place of trial of this action should not also be changed to Fond du Lac county, so that it could be consolidated with the other action, and on the ground that the convenience of witnesses and the ends of justice would thereby be furthered. It appears that both plaintiffs reside at Oshkosh, Wis., and the defendant *Boyington* at Bloomington, Ill., and the defendant *Atwell* at Stevens Point, Wis., where the defendants' attorneys reside; that the only witnesses sworn on the former trial were *John Challoner*, one of the plaintiffs, and *V. P. Atwell*, one of the defendants; that one W. C. Ruckman, a traveling agent of the plaintiffs, is a witness in their behalf. On the part of the defendants, it was shown that, in addition to the defendant *Boyington*, they have a witness residing at Ironwood, Mich., and one residing at Phillips, in Price

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county; but their names were not given, nor was it sworn that they were material witnesses. It was sworn that all defendants' witnesses, including the defendant *Atwell*, reside in Stevens Point and north of there, except the defendant *Boyington;* that defendants did not desire, but would oppose, a consolidation of the cases, and would claim in this action a trial by jury. The court made an order changing the place of trial to Fond du Lac county, from which the defendants appealed.

For the appellants there was a brief by *Cate, Jones & Sanborn*, and oral argument by *D. Lloyd Jones.*

M. C. Phillips, for the respondents.

PINNEY, J. Whether the place of trial of an action should be changed on the ground that "the convenience of witnesses and the ends of justice would be promoted by the change" (subd. 3, sec. 2622, R. S.), is a matter resting in the sound discretion of the court, and an order directing such change will not be reversed but for a manifest abuse of discretion. *Lego v. Shaw*, 38 Wis. 401; *Church v. Milwaukee*, 31 Wis. 512. For the purposes of such an application, the convenience of parties who are witnesses may be considered to the same extent as other witnesses; and it is obvious that the application for the change in this case set forth enough to bring the discretion of the court into action, particularly as it has been held in *Cartright v. Belmont*, 58 Wis. 376, that on such an application "no affidavit or sworn petition is required by the statute or rules of court. It is sufficient if the judge is satisfied by proof that a cause for the change exists." And this court has also held that "in the exercise of such discretion the trial judge may take into account matters within his own knowledge and observation, as well as the proofs presented." *Ross v. Hanchett*, 52 Wis. 493; *Schattschneider v. Johnson*, 39 Wis. 387; *Jackman Will Case*, 27 Wis. 409. The order does not

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show upon what proofs the court acted in making it, beyond the fact that the order to show cause was based on the affidavit of M. C. Phillips, "and the records and files of the case." The records and files of the case, aside from the motion papers, have not been transmitted to this court. It does appear that the trial judge presiding at the former trial heard and granted this application, and we are bound to presume that he may have acquired by observation some knowledge of the case which assisted him in the exercise of his discretion. Error will not be presumed, but must be made to appear affirmatively. In the absence of the records and files, and of any facts which may have come to the observation of the trial judge, we cannot say that the discretion vested in the court was not properly exercised.

By the Court.— The order of the circuit court is affirmed.

MOLASKE, Respondent, vs. THE OHIO COAL COMPANY, Appellant.

September 30 — October 17, 1893.

Master and servant: Injury through negligence of boy fellow-servant: Presumption as to his competency: Usage.

1. The presumption is that a boy under the age of fourteen years is not competent to perform duties involving the personal safety of others and requiring the exercise of a good degree of judgment and discretion and constant care and watchfulness; and in an action for injuries resulting from the negligence of a boy so employed, the burden is upon his employer to show that he was in fact competent.
2. No usage to employ boys of tender years to perform such duties can be upheld.

APPEAL from the Circuit Court for *Ashland* County.

This action is to recover damages for personal injuries received by plaintiff when in the employ of defendant com-

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pany, alleged to have been the result of the negligence of the company, in that (1) it failed to provide suitable machinery and appliances for doing the work in which plaintiff was employed; and (2) it employed an incompetent person to work with plaintiff, through whose negligence the injury was inflicted. There is no testimony tending to show any defect in such machinery or appliances, and hence that alleged cause of action disappears from the case.

The defendant coal company employed plaintiff to work at Ashland, unloading coal from the hold of a vessel, and he commenced work on the morning of July 6, 1892. His duty was to shovel coal into buckets, which, when filled, were hoisted by steam power to the adjacent dock. These were raised, and empty buckets lowered into the hold by the same power, by means of a wire rope attached to a derrick, passing through a movable pulley, having a hook at the lower end of the rope. It was also plaintiff's duty to detach the hook from the bales of empty buckets, and hook the same upon the bales of buckets which had been filled and were ready to be hoisted. The engine which did the work was on the dock, and the engineer could not see the men at work in the hold of the vessel; hence the necessary course of the business was to station a person on the hatchway of the vessel, whose duty it was to signal the engineer when the buckets were ready to be hoisted. Five other men were at work with plaintiff, and it is estimated the buckets were raised from the vessel at the rate of one per minute. A boy from twelve to fifteen years of age was employed by the coal company to give such signals, and had been so employed about a week before plaintiff commenced work there. At about five o'clock in the afternoon of July 6th, plaintiff seized the rope by which an empty bucket had been lowered with his left hand, just below the movable pulley, and the hook with his right hand,

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loosened the hook from the empty bucket, and just as he hooked it to a full bucket, the boy, without being directed by the plaintiff to do so, gave the signal to the engineer to hoist, and he did so while plaintiff still had hold of the rope. His left hand was drawn into the pulley, and two of his fingers were torn off. This is the injury complained of.

The court submitted it to the jury, as questions of fact, whether the boy employed by the company to signal the engineer was of the age of twelve or thirteen years, and whether he lacked the necessary prudence and discretion, to the knowledge of the company, to discharge that duty so as to render the position of the persons at work in the hold of the vessel reasonably safe; and instructed them that if the boy was incompetent properly to perform that duty it was negligence on the part of the company to employ him. The court further charged that if the plaintiff did not know the unfitness of the boy, and was not guilty of any negligence which contributed directly to the injury complained of, and if plaintiff was injured because the boy was thus incompetent, he was entitled to recover.

The jury found for the plaintiff, and assessed his damages at $400. A motion for a new trial was denied, and judgment for plaintiff entered pursuant to the verdict. The defendant company appeals from the judgment.

For the appellant the cause was submitted on the brief of *O'Keefe & Foster* and *McCafferty & Noyes.* To the point that the presumption was that the boy was competent to perform the duties required of him, they cited *Collins v. S. B. H. R. Co.* 26 Am. & Eng. R. Cas. 371; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Chicago & A. R. Co. v. Becker*, 76 id. 32; *Nagle v. A. V. R. Co.* 32 Am. Rep. 413; *Neal v. Gillett*, 23 Conn. 437–442; *Erwin v. St. L., I. M. & S. R. Co.* 35 Am. & Eng. R. Cas. 395, note.

John F. Dufur, for the respondent, to the point that the

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competency of the boy was a question for the jury, cited Buswell, Pers. Inj. 339, sec. 203; *Neilon v. M. & M. P. Co.* 75 Wis. 579; 2 Thomp. Trials, 1662–3; 7 Am. & Eng. Ency. of Law, 856; Shearm. & Redf. Neg. sec. 191.

LYON, C. J. Although upon some of the questions submitted to the jury there is a conflict of testimony, and in some particulars the testimony may be somewhat confused and obscure, yet, after careful consideration, we are of the opinion that it is sufficient to support findings that the exigencies of the business, and the reasonable safety of plaintiff and the other persons employed in the hold of the vessel, required that a person of prudence, caution, and constant watchfulness and attention to his duty should be employed to signal the engineer when to hoist the full buckets; that no such signals should have been given until such person knew that the men in the hold were clear of the buckets and the same were ready to be hoisted; that the boy employed by the company to signal the engineer was about twelve or thirteen years of age; that he gave the signal which resulted in injuring plaintiff prematurely and negligently; that plaintiff did not know who was employed to give the signals, or that the person so employed was incompetent to perform that duty; and that the plaintiff, when injured, was in the exercise of reasonable care. By returning a general verdict for plaintiff the jury necessarily found, under the charge of the court, all the above propositions of fact which the testimony thus tended to prove. These propositions are, therefore, verities in the case. In like manner, under the charge of the court, the jury necessarily found that, to the knowledge of the coal company, the boy was incompetent to perform the duty of giving such signals with reasonable safety to the plaintiff and his co-employees in the hold of the vessel. If such finding is also supported by the testimony, there can be no

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doubt that the plaintiff is entitled to recover in the action. Whether it is so supported is, therefore, the only question to be determined on this appeal.

The only testimony bearing upon the question of the competency of the boy is, on the part of plaintiff, that the boy was only about twelve years old, and that he prematurely and negligently gave the signal to hoist which resulted in injuring the plaintiff; and on the part of defendant, that he performed that duty satisfactorily for about a week before the injury. True, there are other statements in the testimony on behalf of defendant, as that such boys are usually employed to give the signals, and that the custom is to give them in the first instance to the engineers, when the person charged with the duty of giving them sees for himself that the full buckets have been attached to the hoisting apparatus, and then for him to warn the workmen in the hold of the vessel to get out of the way. It is claimed that such testimony also tends to establish the competency of the boy; but we think otherwise. No usage to employ boys of tender years to perform duties involving the personal safety of others, which require judgment, discretion, and care greater than is usually possessed by boys of such age, can be upheld for a moment. As to the other branch of the testimony just mentioned, if it is a valid custom for the person employed to signal the engineer to give the same as his inspection and judgment dictate, without signals from the hold of the vessel, a still greater responsibility rests upon the company in the choice of an employee to give the signals, and greater care is required in making such choice than would be required were the signals given after information received from the men in the vessel that the buckets were ready to be hoisted. So this testimony is rather against than in favor of the company.

As above stated, the facts that the boy was but twelve or thirteen years old, and that the plaintiff received the

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injuries complained of because of his negligence in prematurely giving the engineer the signal to hoist the bucket, are verities, made so by the verdict. The controlling question is, Are those facts sufficient to send to the jury the question whether the company is liable to respond in damages for plaintiff's injuries, on the ground that it knowingly employed an incompetent person to give the signal to the engineer, there being no proof that the boy failed to perform his duties properly in any other instance? It seems clear to our minds that the above question should be answered in the affirmative. The duty of giving the hoisting signal to the engineer required the exercise of a good degree of judgment and discretion, and constant care and watchfulness. It is common knowledge that, while a boy of twelve or thirteen years of age may possess and be capable of exercising these qualities, yet a large percentage of such boys do not possess them or are not capable of exercising them continuously. It would prove a great strain upon an adult to require his undivided attention every minute of working time during each day to giving these signals, especially if properly conscious that a single mistake might result in maiming or killing some one in the vessel. It is certain that very many boys of twelve and thirteen years of age — probably a large majority of them — would be incapable of enduring that strain, and would prove entirely unable to maintain the ceaseless concentration of thought and purpose required, or to exercise in each emergency of the business the judgment and discretion essential to the safety of those men. That the boy employed by the coal company to give those signals possessed those qualifications is not conclusively proved by the fact that he performed the duty properly for a week, although it is to his credit that he did so. We are not informed of the amount of work done during that week, or how pressing or constant his duties were.

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The presumption of the common law is that a child under fourteen years of age is incapable of committing a crime; but, as applied to a child over seven years of age, this presumption may be rebutted by evidence. 1 Bish. Crim. Law (6th ed.), § 368. The rule recognizes the immaturity of children of such tender years, their lack of judgment and will and concentration of purpose, the existence of which conditions all experience has proved, and fixes the age when the presumption of capacity arises at fourteen years. In analogy to that rule, and having due regard to what we deem most persuasive considerations of public policy, we hold that on the proofs in this case the presumption of law is that the boy employed by the coal company to give the signals was incompetent for that duty, and that the company employed him at its peril of being able to prove, if sued for injuries resulting from his negligence, that he was in fact competent. We hold further that the defendant has not proved conclusively the competency of the boy, and hence that the verdict finding him incompetent cannot be disturbed.

By the Court.— The judgment of the circuit court is affirmed.

FAERBER, Administrator, Respondent, vs. THE T. B. SCOTT LUMBER COMPANY (LIMITED), Appellant.

September 30 — October 17, 1893.

Master and servant: Death of servant caused by negligent management of "slab burner": Evidence: Remarks of counsel.

1. In connection with its sawmill defendant had a "slab burner," constructed of sheet iron, in three sections, in all about ninety-five feet high, the lowest section, which was lined with brick, being thirty-five feet high and forty feet in diameter, and the highest section about twenty-one feet high and seventeen feet in diameter.

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In this burner the slabs and other refuse of the mill had to be disposed of as fast as they accumulated, in order to prevent their overwhelming the works. The only safe way to use the burner was to kindle the fire early in the morning, so that the slabs should be consumed as fast as they were conveyed to it, since, if a large quantity of slabs accumulated in the burner, they would overheat it and open the seams or burst its sides, as had happened once, some years before the day in question. On that day, through a failure to get the fire properly started, there was an accumulation of slabs which nearly filled the lowest section of the burner, and about the time the mill shut down at noon they became fully ignited, and the intense heat caused the burner suddenly to collapse, the highest section falling upon and killing plaintiff's intestate, who was passing. *Held*, that the accident was caused by defendant's negligence in not stopping the mill during the morning so as to allow the burner to clear itself and thus avoid the accumulation of slabs therein.

2. The refusal to allow a witness to testify that the burner was built like other approved burners used in similar mills was not error, since the accident was not caused by any defect in its construction, but by its negligent and improper use.

3. The negligence of defendant's superintendent who had full charge of the burner and its management on that day was negligence of the defendant.

4. Remarks of plaintiff's counsel in his argument to the jury, charging defendant with being actuated by motives of parsimony in neglecting to repair or replace the burner after the former injury to it, are *held* not to have been improper.

APPEAL from the Circuit Court for *Lincoln* County.

Action to recover damages for the death of plaintiff's intestate. The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

John H. Brennan, for the respondent.

ORTON, J. The main facts of this case are as follows:

At the time of the accident that caused the death of the respondent's intestate, the appellant company owned and

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operated, and for many years had owned and operated, at Merrill, in Lincoln county, this state, a very large sawmill, of the capacity to cut or saw 150,000 feet of lumber in one day of eleven hours. In connection with said mill, and necessary to its successful business, there was operated an immense slab burner, constructed of sheet iron riveted together at the joints, and circular in form. The lower section or base had perpendicular sides, and was thirty-five feet in diameter, and about forty feet in height; the second section, riveted to the top of the lower section, was cone-shaped, and thirty-two feet in height, reduced at the top to about seventeen feet in diameter; and the upper or top section was about twenty-one feet in height, with straight or perpendicular sides, with a wire screen or spark catcher at the top. The whole structure was about ninety-five feet in height. The top part, alone, weighed 5,000 pounds. The lower part was lined with brick masonry to within a few inches of the cone, and was sixteen inches thick at the bottom, and grew less towards the top. There were no ribs or framework inside to sustain or protect it. The sheets or pieces of sheet iron used in its construction were forty-three inches wide by nine feet in length, and they were riveted or bolted together at the seams. There was a large opening or door near the top of the lower section, through which the slabs and other refuse entered the burner, and there were two openings or doors near the bottom, on opposite sides, used for kindling and making fires, and for going into it, and perhaps for draught.

It will be observed that this is a thin and hollow cylinder thirty-five feet in diameter, and nearly 100 feet high, standing and bearing up many tons in weight by its own unsupported strength. The diminishing diameter of the conic section would naturally so compress the expanding gases and heated air within the lower section as to challenge to its utmost its power of resistance. From its great dimensions,

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it is obvious to any one that this was a very weak and unreliable structure, but sufficient for the prudent use for which it was intended. From the mill to its upper opening or door there was a "conveyor" or "traveler," as it was called, for conveying all the slabs and other refuse from the mill to the burner as fast as they accumulated. It is necessary that this conveyor should do its work constantly while the mill runs its saws, or these accumulations would overwhelm the works, and there is no other way of disposing of them. Another thing must be considered: The logs to be sawed are often, if not usually, drawn into the mill from the water, and many of the slabs are still wet when they reach the burner. They are not only hard to burn, but steam, as well as gases, is generated. The testimony appears to be uncontradicted that the only safe and proper way to use the burner is to kindle a fire at the bottom early in the morning, before or at the time the mill starts up, so as to have the slabs consumed as fast as they are received. The mill and the burner and the conveyor should run together. If the mill and conveyor run before there is a good fire started, the burner becomes filled and packed with wet slabs, which not only retard or prevent the building of the fire, but by the time the fire begins to consume the slabs there will be a superincumbent mass of wet slabs nearly to the top of the lower section; and when they become dry enough to burn, and the whole mass takes fire, it is a scientific certainty that the burner will become so intensely and unusually heated as to greatly injure, if not destroy, the burner itself. The pent-up steam and gases within this burning mass of over thirty feet in diameter and nearly forty feet in height has to be compressed and escape through this cone-shaped cylinder above. The most natural consequence would seem to be that its seams would be opened, its sides twisted and rent, and the whole structure topple to the ground. It never was intended to meet such a trial

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of its strength. It was intended that the slabs should be burned as fast as received, and the burner kept open and clear as possible; and so it would be, if a good fire is started before the mill and conveyor begin their work. The witness Anderson, who was foreman of the works in 1886, testified "that during all the period he was there the fire was started up in the morning, and well going before the mill was started; that was the fact and the rule while he was there." These facts were verified by a practical trial and experiment in the summer of 1886. "There was one day that they didn't get the fire started promptly in the morning, and the conveyor and mill ran till probably nine o'clock, and filled the burner up, without enough fire in it to burn the slabs. It filled up very nearly to the opening where the slabs come into it, and we built a fire in it through those doors, and tried to get the fire started in it. The mill kept running. In that way, it was overloaded all day, and wet slabs got to running into it, and in the evening, after the mill was shut down, the fire got to burning, and it overheated the burner in the top part, where it was red hot, and the draught through there seemed to *work* the burner in the cone part; and when it cooled off it was shrunk in two places by overheating, and it sank in a couple of places, and the screen sank in, also, and the conveyor caught fire in one spot. Mr. Biron, the millwright, and Mr. Hixon, the secretary of the company, were present." This was the testimony of Edward Anderson. This witness testified, further, that "after that all we done was to see that the fire was started in the morning, and be certain of it, before we started up the mill." After that it seems that the men were instructed not to allow the fuel to get higher in the burner than a certain fixed line; "the danger line," as it was called by Mr. Graham, the superintendent. The "dents and sagging" in the iron remained in plain sight, as a warning not again to so overheat the burner. One witness saw that the rivets

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were out or broken, and iron sheets loose, as an effect of such overheating in 1886.

On the 28th day of September, 1891, in the morning, before 6 o'clock, there was an attempt to start a fire in the burner before the mill started, but just after the mill started some small wet Norway slabs came through the conveyor and put it out. At 7 o'clock they broke up an oil barrel, and attempted to start the fire again, and then broke up more oil barrels; but it burned slowly, and slabs came in incessantly. They tried to increase the fire by the use of shavings and kerosene oil. About 9 o'clock, Graham, the superintendent, came, and saw the condition of the fire in the burner. He gave some directions, and went away. About 10:30 o'clock the fire started up a little better. At 11 o'clock, Graham looked down into the burner, and it was full of smoke. He was told that the burner was full of slabs. Some one tried to throw the slabs out of the conveyor as fast as they came, but this could not be done. All this time the mill was running, and the slabs were coming into the burner, and had been coming about five hours before 11 o'clock, when the fire got under headway. About 12 o'clock the fire seems to have ignited the whole mass within the burner, and it became an intensely hot fire, and the heat and flames shot up into the air above the burner; and, between 12 and 1 o'clock, Louis Knudson, the deceased, who was ordered to do certain work as a carpenter, which required him to go in a pathway along by and near the burner, happened to be at that time in the very spot where he came to his death. Just as he was passing by the burner, it suddenly collapsed or broke to pieces, and the third or highest section came to the ground headforemost, and fell upon the ill-fated Knudson, and, of course, killed him instantly.

This action is brought by the administrator of his estate to recover damages for the benefit of his estate, according

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to the statute, on the ground that his death was caused by the culpable negligence of the defendant company. The jury returned a verdict for the plaintiff for the sum of $5,000, and the defendant has appealed from the judgment. The defendant moved to set aside the verdict and grant a new trial therein, on the grounds that the verdict is contrary to the law and to the evidence, and the damages excessive.

1. The main question in this case is upon its merits, on the exception to denying the said motion for a new trial. The third contention in the brief of the learned counsel of the appellant is headed as follows: "The proximate cause of the falling of the burner was clearly shown to have been the *excessive heat* suddenly generated by the cessation of fresh fuel falling upon the fire, upon the mill shutting down for the noon hour. No negligence, unless it be that of a fellow-servant, is shown by the evidence, but it was an unforeseen and unexpected accident." This is an admission that the proximate cause of the falling of the burner *was the excessive heat suddenly generated.* It is too clear for question that the same cause that produced the excessive heat that caused the burner to shrink and bulge out, and to open its seams and tear out the rivets, and to nearly collapse it, in 1886, produced the excessive heat that caused it to fall at the time of this fatal accident. It was certainly not the stopping of the mill at noon, but it was not stopping the mill in the morning, and all along the forenoon, until the fire was sufficient to consume the slabs as fast as they came in. The witnesses all agree that this was the only safe and proper rule. It is obvious, and a natural consequence, that when such a mass of material was all on fire at once it would produce just such excessive heat as the learned counsel admit caused the burner to fall. It was all on fire, and the heat most intense, and the flames rising above the top before the mill was stopped. The

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mischief had been done. It was the negligence of the company, all along that forenoon, in not stopping the mill so as to allow the burner to clear itself and consume the slabs as fast as they came, and in starting up the mill in the morning before there was any fire to consume the slabs, that prepared the way and laid the train for the catastrophe that was sure to follow. The company had an experimental knowledge of such a consequence following such a cause, and they heeded it not, but repeated the experiment. Mr. Graham, the superintendent, when he looked into the top of the burner and found it packed full of slabs and many of them wet, must have known that when that whole mass became on fire the heat would be intense beyond all calculation, and that there was great and imminent danger that the burner would collapse and tumble to pieces, as it did. It was a frail structure at best, and after it had been weakened by seven years' constant use, and injured by excessive heat in 1886, any one might have known that it could not withstand this last most dangerous trial. The negligence of the company appears to have been established beyond a question or doubt.

2. The second error assigned is allowing the witness Shank to answer the question whether one man could take off from the conveyor all the slabs as fast as they came. This was not a question for an expert. It could be intelligently answered by any one acquainted with the business, and it was not material. It is sufficient that the slabs were not taken off as fast as they came. The efficient remedy was apparent, and that was to stop the mill and making slabs, until they could be disposed of safely by burning in the usual way. The usual way was the safe way, and those two extraordinary instances — the last one followed by such a fatal result — were the most careless and dangerous ways of using the burner, and the company had abundant reason to know it.

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3. It is contended that the hypothetical question put to the expert witness was imperfect in stating the facts. They appear to have been very fully and correctly stated. But there is no place for expert testimony in this case. The causes of this injury are as clear as light to any one of ordinary intelligence and observation.

4. The refusal to allow the witness Worden to testify that this burner was built like other approved burners used in other mills of like capacity was not error. The injury was not caused by any defect in the construction of the burner, but by its negligent and improper *use*. The question was therefore immaterial.

5. The knowledge of all the material facts which constitute the negligence in this case was sufficiently brought home to the company by seven years' experience, so that we need not inquire whether the acts or knowledge of the superintendent or others in its employment bind the company. But there can be no doubt that Graham, superintendent, had full charge of the burner and its management on that last day, and that his negligence bound the company, and the charge of the court to the jury on that subject was clearly correct.

6. The remarks of the counsel of the respondent in his argument to the jury, charging the company with being actuated by motives of parsimony in neglecting to repair or replace the burner upon its injury in 1886, appear to have been within the license of forensic debate.

The case was ably tried on both sides, and the rulings and instructions of the court appear to have been fair and considerate, and the verdict is sustained by the evidence, and just, and we find no cause for disturbing it.

By the Court.—The judgment of the circuit court is affirmed.

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ALFORD, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

September 30 — October 17, 1893.

Railroads: Injury to passenger alighting from train: Court and jury.

In an action against a railway company for personal injuries sustained by plaintiff while leaving a train, where her evidence tended to show that she left her seat, with her baby in her arms, when the train stopped, and proceeded with reasonable diligence to the front platform, and that while in the act of alighting with her husband's assistance the train started and threw her to the ground, it was error to direct a verdict for defendant, although the evidence on its behalf tended to show that she did not start to leave the train until it was again in motion, and in fact jumped from the train while it was moving.

APPEAL from the Circuit Court for *Marathon* County.

Action to recover for personal injuries. Plaintiff and her husband were passengers on defendant's passenger train, and had tickets for a station called Heights. The conductor took their tickets, and knew that they were to get off at that station. They had several bundles, and plaintiff had a baby about a month old with her. The brakeman called the station as the train approached it, and went to the back end of the car to assist the passengers to alight. Plaintiff testifies that she and her husband were sitting near the front of the car, and as the train stopped they left their seats and went to the forward platform, the husband going first with the bundles, and she following with the baby. No employee was at the front platform to assist them. She further testifies that her husband got off the car, and had one foot on the station platform, and one on the step of the car, and that she was on the second step, holding the baby, and her husband was trying to lift her off, when the train started and she was thrown thereby to the platform and injured. She thought the train stopped

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somewhere between fifteen and thirty seconds. There was evidence on the part of defendant tending to show that the train stopped nearly or quite two minutes, and that both plaintiff and her husband negligently delayed in leaving the car, and jumped from the car while the train was moving. The accident happened in the evening about 9 o'clock, and it was dark. A verdict for defendant was directed, and from judgment thereon plaintiff appealed.

For the appellant there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *C. B. Bird.*

G. P. Cary, of counsel, for the respondent.

WINSLOW, J. We think this case should have been submitted to the jury. The plaintiff's evidence tended to show that she started from her seat, with her baby in her arms, when the train stopped, and proceeded with reasonable diligence to the front platform, and that while in the very act of alighting with her husband's assistance the train started and threw her to the ground. It is true there was evidence on the contrary, which tended to show that she did not start to leave the train until it was again in motion, and in fact jumped from the train while it was moving. But the plaintiff was entitled to have her statement of the facts passed upon by the jury. If it was a fact that she exercised due diligence in leaving the train after it stopped, and that the train started while she was obviously in the act of alighting, it is very clear that this would constitute negligence on the part of the company. *Davis v. C. & N. W. R. Co.* 18 Wis. 175; 2 Am. & Eng. Ency. of Law, 762. The case is not like that of *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610, where the passenger deliberately stepped from the train while in motion.

By the Court.— Judgment reversed, and action remanded for a new trial.

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GOFF, Respondent, vs. THE CHIPPEWA RIVER & MENOMONIE RAILWAY COMPANY, Appellant.

October 2 — October 17, 1893.

Master and servant: Injury to servant working in dangerous place without direction: Special verdict: Inconsistent findings.

1. An employer is not liable for injuries sustained by an employee in an unsafe or dangerous place in which he was working without any express or implied direction from the employer, even though the same work had been done at other times by other employees in the same place.
2. A special verdict finding that plaintiff, an employee of the defendant corporation, was not, when injured, engaged in the regular course of his duties at the place where directed by defendant's servants charged with the duty of designating the proper place for the performance of such duties; that the place where he was injured was the place where the work he was doing had previously ordinarily been performed, to the knowledge of defendant's agent; that it was the place provided by the defendant for the performance of that work; that it was not reasonably safe for that purpose; and that the proximate cause of plaintiff's injury was a want of ordinary care on the part of the defendant in not providing a reasonably safe place for him to be while doing his work,— is *held* to be inconsistent and not to sustain a judgment for plaintiff.
3. Where a considerable force of men is engaged in a business necessarily somewhat dangerous — in this case the loading of logs upon cars,— it is the duty of the employer to have some one in attendance to see that the men have reasonably safe places in which to do their work.

APPEAL from the Circuit Court for *Chippewa* County.

Action by an employee for personal injuries, brought against the defendant, a railway company organized for the purpose of transporting saw logs. The railway in question runs over a pond used for holding logs, which are drawn up out of the pond upon a loading dock by means of an endless chain and slide, and are rolled from thence

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upon the cars. At the place in question there is a main track and a side track, all built on piling. Piles were driven at intervals on the east side of the main track and west of the side track, where said tracks lie near together, and a timber or cap piece was framed on the top of the piles to prevent logs, when rolled from the loading dock upon the bunks of the cars, from rolling over and off upon the other side. The main track was planked in the middle, and the loading dock and rails were long enough to admit of loading three cars at a time, each car being twenty feet long. The bunks or bearers extend on each side about two feet over the track, and, when a car passed which stood on the side track east of the two piles designated "A" and "B," the distance between the end of the bunk and each pile would be about four inches. Between the piles and the west edge of the side track and east of the piles "A" and "B" the space was pretty much filled up with plank. At this point the plaintiff was standing for the purpose of counting the logs and fastening the chains to secure the logs on the car after they were loaded. The testimony tended to show that he had commenced this work in the morning, at the direction of one Moore, the defendant's foreman, who had explained to him in a general way what was required of him. While he was busily engaged standing opposite the piles "A" and "B," with one foot on a log and the other on some plank between the two tracks, with his back towards the side track, an empty car was driven down the side track without any warning, and its bunk struck him above the hips, and forced him up against the pile designated "B," and through between the end of the bunk and the pile, a space of only four inches, whereby he was bruised, crushed, and greatly injured. It was charged in the complaint that though the defendant had notice of and well knew the dangerous character of the place, it had neglected to furnish the plaintiff a safe, proper,

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and convenient place to stand and perform his said work while so employed as aforesaid, whereby he received the injuries of which he complained.

In respect to the hiring of plaintiff and his being set at work where he was injured, he testified that Newton Mills, the defendant's superintendent in charge of the work, hired him and spoke to him of working at the foot of the slide running down into the water, where a man stands with a pike pole and swings the logs into a straight line, so that they go up the slide to the dock, and that was the work he spoke to him about doing when he hired him. That he went to work on the dock May 7, 1890, counting logs and hooking bunk chains at a different place from the logging slide. That he commenced that kind of work at the request of Moore, foreman of the defendant in charge of the operations there, Mills then being absent, who pointed out to him the work of counting the logs, while they were standing on the cap piece over the piles, showing him about counting and hitching the bunk chains, and he told him that the place to hitch the chains was where he was afterwards hurt. That he had never done that work before; first learned that the side track was too close when he got caught. That Mr. Mills did not tell him to go up there to count logs and do up the ends of chains. "I was not hired for that purpose. Moore was at work on the works like the rest. He had general oversight." That he did not attempt to direct plaintiff where to stand. That there was no other place where he could stand and hook the chains but where he did. And there was testimony given tending to show that Moore pointed out to the plaintiff where to hook the chains, in the same place where he was hurt.

Mills, the superintendent, testified that he never knew of Moore being foreman. That he never had any authority from him or the company that he ever knew of to hire or discharge men. That he was the timekeeper. "From time

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to time I gave him special instructions with reference to matters. He had no other authority than to see that the men worked as I directed them, and he had no authority to change any of my directions. He had been in the employ of the defendant for about eight years." That he first talked with plaintiff about working at the slide, but when he came around again he told him he had a man for the job he wanted. That he wanted a man to tie up the chains if they were left dangling, and to count these logs, and get the cars in readiness for pulling from the dock. "He said that would suit him." I told him that I wanted him to do the work, and how to do it. That when the switch engine had pulled down these six cars he was to adjust the brake stems in their sockets, count the logs, and fasten the chains if any should be left dangling. Hicks counted some logs in front of the loading dock for probably four or five days. He (Mills) had hooked chains in the same place by going in between the piles, which was practically the very best way to hook them. It was optional with the man who had it to do. When I was present I had supervision of the operations. Did not have a man to act in that capacity. Moore kept time of the men. "He did not have control of the operations when I was not there. Nobody had control of them. They ran without anybody being in control of it. Moore did not direct the operations, and did not give the men instructions what to do. I did not know that he directed them. He was keeping time; did not act as a foreman generally acts. He worked like the rest of the men I was in charge of. I was usually there when it was necessary to change anybody. When not there, there was no changes made. When absent, I knew I could send word to him, and communicate through him with the other men, and he would do the talking to the men for me."

Moore testified: "I was simply keeping the time and looking after the thing. I hired out that summer, looking

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after loading logs, just simply keeping the time. On the morning in question I saw plaintiff about six o'clock. Told him to go out and count the logs. No one gave me any instructions to tell him that. I told him to go to work counting the logs, because I wanted a man to do it. That morning I said to him, '*Mr. Goff*, you can go out and keep tally on these logs to-day.' I did not tell him where he was to do it." He denied telling plaintiff to go to where he was at the time of his injury. Said that he did not explain to him where he was to count the logs. Up to then had never employed or discharged a man. "I had charge and looked after the work when Mr. Mills was not there. If he was not there I would show them. I was the person who gave directions if Mr. Mills was not here. I was the person in charge when Mr. Mills told me; was the person who had charge when he was not there. I was just the timekeeper; went by Mills' instructions. Mr. Mills gave me no instructions about *Goff*. I set him to work the same as others."

The answer was, in substance, a general denial, but testimony was given tending to establish other material allegations of the complaint. The court left to the jury the question "whether the plaintiff was engaged, when injured, in the regular course of his duties as one of the defendant's employees at the place where directed by defendant's servant charged with the duty of designating the proper place for the performance of such duties;" but in this connection instructed them "that the evidence would not warrant them in finding that the witness Moore was charged with the duty of locating plaintiff at his work, because called a foreman by some of the witnesses; that it must be held, under the evidence, that in all he did he was a mere co-laborer with plaintiff, and was not charged with the duties of the principal; that for the purposes of this action Newton Mills was the vice principal, and in determining whether

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plaintiff was stationed where he was at the time of the injury complained of by authority of defendant's agent charged with the duty of designating the place for him to perform his labor, Newton Mills must be considered to have been such agent;" and the jury answered said question in the negative.

Other questions and answers followed. "(2) Did Newton Mills instruct plaintiff to do his work after the cars were moved away from the loading dock to the main track? *A.* No. (3) Was the place where plaintiff got injured the place where the work he was doing had previously ordinarily been performed, to the knowledge of defendant's agent, Newton Mills? *A.* Yes. (4) Was the place where plaintiff was injured the place provided by defendant for the performance of the work plaintiff was engaged in? *A.* Yes. (5) Was the place where the plaintiff was injured reasonably safe for the performance of the work he was engaged in? *A.* No. (6) Was the risk to which plaintiff was subjected while doing his work apparent to a person by ordinary observation, circumstanced as plaintiff was in the performance of such work? *A.* No. (7) Was the proximate cause of plaintiff's injury a want of ordinary care on the part of defendant in not providing a reasonably safe place for him to be while doing his work? *A.* Yes. (8) Was plaintiff injured by reason of negligence on the part of the defendant's servants in operating the cars? *A.* No. (9) Was the danger of the plaintiff's position as apparent to the plaintiff as to the defendant? *A.* No. (10) Was there any want of ordinary care on the part of the plaintiff that contributed to the injury received? *A.* No."

The jury assessed plaintiff's compensation at $800. A motion to set aside the verdict and grant a new trial because contrary to law and evidence was denied, and judgment was entered on the verdict, from which the defendant appealed.

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For the appellant there was a brief by *Jenkins & Jenkins*, and oral argument by *John J. Jenkins*.

For the respondent there was a brief by *T. F. Frawley* and *W. H. Stafford*, and oral argument by *Mr. Stafford*.

PINNEY, J. It is the duty of the master or employer to furnish his servant or employee a reasonable safe place in which to perform his work, and suitable and reasonably safe instruments with which to perform it. But it would seem that it is not sufficient to charge the employer with neglect in this respect that he had hired one to work for him, and that he, without the knowledge, authority, privity, or consent of his employer, and of his own volition, entered upon the work of the employer in, and occupied in its performance, an unsafe and dangerous place, even though the same service had been performed at other times by other employees for the employer in the same place. The employer is responsible only for his express or implied direction to an employee to work in an unsafe or dangerous place. The work of the employer is to be under his own control, and under the responsibility which the law places upon him; and it is for him or his lawful agent to give such orders or directions as he may judge discreet in respect to the place where his employees shall work, having in view their skill, prudence, and experience. He or his rightful agent may assume the risk in any given case, but the employee cannot of his own mere unauthorized motion take the risk, and hold the employer responsible for disastrous consequences. The liability does not exist unless the employer or his agent knows, or has good reason to believe, that the employee is serving him in a dangerous place or position; for without such knowledge the duty of warning or protecting the employee does not arise and will not exist, for the plain reason that the liability is not absolute, but relative, and is founded solely on the employer's

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negligence, which cannot be affirmed without knowledge or notice of duty in the particular instance, such as would warn the employer and afford him a fair opportunity to discharge it.

In the present case it is found by the verdict that "the plaintiff, when injured, was not engaged in the regular course of his duties as one of the defendant's employees at the place where directed by defendant's servants charged with the duty of designating the proper place for the performance of such duties." The defendant is a corporation, and could act and give direction only by or through its proper officer or agent. There is no pretense that any one in fact assumed on behalf of the defendant to direct where the plaintiff should work, or what he should do, except the foreman, Moore; and as to him the court withdrew from the consideration of the jury all he said or did in that direction, on the ground that the evidence would not warrant them in finding that Moore was charged with the duty of locating the plaintiff at his work, or with the duties of principal, and that Newton Mills must be considered to have been such agent. The result is that it has been established by the verdict that Mills did not act in the premises at all, and the court decided as a matter of law that Moore had no authority to represent the defendant in relation thereto. There is no ground for contending that any other officer or agent of the defendant assumed any authority or direction in the premises. There was, therefore, a total failure to bring home to the defendant notice or the knowledge of any duty it was bound to exercise as to the plaintiff, and it was therefore called on to exercise no protection or means on its part to guard him from injury at the place in question. It was necessary that there should have been some business relation or privity between the plaintiff and defendant in order to raise the duty which it is charged that the defendant neglected.

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The gist of the action is the alleged negligence of the defendant; that is to say, that there was the absence of that degree of care required by the particular circumstances of the case. Cooley, Torts, 630; *Railroad Co. v. Jones*, 95 U. S. 441; *Vaughan v. Taff Vale R. Co.* 5 Hurl. & N. 679. "To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. . . . It is not enough to show that the defendant has been guilty of negligence without showing in what respect he was negligent and how he became bound to use due care to prevent injury to others." *Gautret v. Egerton*, L. R. 2 C. P. 375; *Cahill v. Layton*, 57 Wis. 614. That the duty of the defendant in such a case as this is relative, and not absolute, is well illustrated in *Griswold v. C. & N. W. R. Co.* 64 Wis. 657; *Gillis v. Penn. R. Co.* 59 Pa. St. 143; *Jenkins v. C., M. & St. P. R. Co.* 41 Wis. 112; *Cole v. McKey*, 66 Wis. 510. For want of some proper or authorized direction to the plaintiff, express or implied, to work at the alleged dangerous place where he received his injury, raising the duty on the part of the defendant alleged to have been neglected, we think that the recovery in this case cannot stand, and that the case in this respect is, in principle, quite like the cases cited.

The judgment of the circuit court seems to have been rested on the ground that it was found by the jury that the place where the plaintiff got injured was the place where the work he was doing had previously ordinarily been performed, to the knowledge of the defendant's agent, Mills, and was the place provided by the defendant for the performance of the work plaintiff was engaged in, and was not a reasonably safe place for that purpose, and that the proximate cause of the plaintiff's injury was a want of ordinary care on the part of the defendant in not providing him a reasonably safe place for him to be while doing his work. The last finding is, we think, clearly inconsistent

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with the first and fourth findings, to the effect that when injured he was not engaged in the regular course of his duties at the place where directed by defendant's servants charged with the duty of designating the proper place for the performance of such duties, and that the place where he was injured was the place provided by defendant for the performance of the work he was engaged in. The first and fourth findings are also inconsistent with each other. Besides, as we have seen, all evidence to sustain findings consistent with the first that would warrant a judgment for the plaintiff was, in effect, withdrawn from the consideration of the jury.

It appears that the plaintiff was inexperienced in the particular work he was engaged in, and had but an imperfect knowledge of the surroundings and its danger. Even if he knew that the place in question was where the work had ordinarily been performed and had been provided by the defendant for that purpose, which was not shown, he had no right, of his own mere motion, without any previous direction, express or implied, to assume to work therein for the defendant; for, although its employee, as to the particular work in hand he took the risk on himself in thus acting without the knowledge or authority of the defendant, express or implied. We consider the verdict so inconsistent and uncertain, and in important respects not warranted by the evidence as left to the jury by the court, that it cannot sustain the judgment.

There is a conflict in the testimony between Mills and Moore, the foreman, as to the authority of the latter to have spoken and acted for the defendant on this occasion. Upon this question there is no finding. Moore had acted as the foreman of the defendant, it would seem, for a considerable time, and was apparently exercising, in the absence of Mills, control of the men and the work. The situation and the circumstances, all considered in connec-

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tion with the evidence, tend to show that Moore had authority to direct, in the absence of Mills, where the plaintiff should work, and that that question might properly have been submitted to the jury. The extent and nature of Moore's authority is not to be judged wholly by what either he or Mills testified in respect to it. The course of business, the attendant facts and circumstances, are also to be considered, and are quite as decisive as the opinions of these witnesses. Besides, we think it was the duty of the company to have some one in attendance on so considerable a force of men engaged in a business necessarily of a somewhat dangerous character, to see that they had reasonably safe places in which to do their work. We do not think that the defendant should be permitted to abdicate its proper functions on such occasions, and permit its superintendent to go away and let the business, as he expressed it, "run without anybody in control of it," and then disclaim all liability in the premises. If Moore was foreman, and directed the plaintiff where to work, and was in fact apparently in charge of the men and work, and the plaintiff obeyed him, it may be that, as against the defendant, taking the benefit of his acts in that capacity in carrying on its work, his apparent authority should be held to be the real one, and the defendant be bound by his acts. But, as the question is not fairly presented by the record, we reserve it for further consideration after another trial, if occasion shall require.

Without considering other questions argued, we think, for the reasons stated, that the verdict should have been set aside and a new trial granted, and that for want of a sufficient and consistent finding on the question of defendant's negligence the judgment cannot be sustained.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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STUBBINGS, Respondent, vs. MCGREGOR and others, Appellants.

October 2 — October 17, 1893.

(1-4) *Sale of chattels: Estimate of quantity, in nature of an award of arbitrators: Omissions: Evidence: Determination by court.* (5) *Costs: Discretion.*

1. A contract for the sale of certain lumber provided that the amount thereof should be estimated by two persons, one chosen by each party, and said two to choose a third in case of disagreement, and that their estimate should be conclusive. *Held*, that the estimate so made stood upon the same ground as an award of arbitrators, and should not be disturbed except for fraud or a mistake, as distinguished from mere misjudgment, affecting in a considerable degree the substantial rights of the party complaining of it.
2. Such estimators having, without authority, regraded the lumber and omitted from their estimate a portion thereof which was included in the sale, their partial estimate is wholly inoperative.
3. The objection that the evidence of the estimators, or their subsequent statements, could not be received to impeach their estimate, could not be made for the first time on appeal to this court.
4. The lumber having been shipped away by the purchasers, after such partial estimate, so that a new estimate could not be made, the court in a proper case might hear proofs as to the quantity of the lumber and decree accordingly.
5. Defendants having appealed from the taxation of costs by the clerk, plaintiff offered to deduct the sum claimed as excessive if defendants would withdraw their appeal without costs of motion, but defendants declined to do so. The court, having found that a smaller sum should be deducted, refused costs of motion. *Held*, not an abuse of discretion.

APPEAL from the Circuit Court for *Oneida* County.

The plaintiff and defendants entered into a written agreement April 23, 1890, by which the former bargained and sold to the latter "all the lumber belonging to him now in pile at the mill of E. K. Buttrick in Rhinelander, Wis., excepting culls in pile, and excepting timber. . . . All to

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be delivered and shipped on or before September 15, 1890; the quantity of said lumber to be ascertained by estimating the same in the piles where the same is now piled." Each party was to choose one person to estimate the lumber, and they were to estimate it immediately, and if they could not agree the two persons should choose a third person, and a majority of the three were to make the estimate, "and the estimate thus made, either by the two or the three persons, shall be conclusive and binding upon the parties." The defendants were to pay $11 a thousand for such lumber, according to the estimate thus provided for. Alexander McPhail and Thomas E. Strange were chosen, as provided, to make the estimate, and they agreed that the amount of the lumber was 2,974,000 feet. The plaintiff, being dissatisfied, commenced this action to restrain the defendants from further interfering with the lumber, and for a judgment declaring the amount of the lumber in question, and for general relief, alleging that through fraud or gross mistake on the part of the estimators a large amount of said lumber which the defendants were to take and pay for had not been estimated at all; that through such fraud, collusion, or gross mistake, the plaintiff would by said estimate, if allowed to stand, get no pay for over 330,000 feet of lumber sold at $11 per thousand; that the defendants had shipped between 300,000 and 400,000 feet of the lumber sold to various points; that the plaintiff, immediately after the estimate was made, notified the defendants that the estimate was wrong, false, and fraudulent, and that he would not accept it; that he ascertained from one of said estimators that a large amount of the lumber, exceeding 100,000 feet, had been overlooked by mistake and not estimated; that the defendants refused to make any adjustment of the matter, and insisted on the estimate already made as conclusive; that the plaintiff forbade the defendants removing the lumber; and that the defendants were insolvent,

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but threatened to continue to remove the same. The plaintiff offered to rescind the contract. The defendants, in their answer and at the hearing, insisted that the estimate of 2,974,000 feet was just and fair and as nearly the exact measurement as it was practicable to arrive at on an estimate, and the allegations of the complaint were substantially denied.

The court found that the work of the estimators was grossly inaccurate; that they made a gross mistake as to the amount of the lumber which they did estimate; that it amounted to 3,088,030 feet, instead of 2,974,000, being an excess of 113,425 feet; that there should be practically no difference between a reasonably careful estimate of the lumber in pile by competent estimators, and the actual board measure of the same; that the estimators wholly failed to estimate and include therein three piles of lumber containing 85,000 feet, which were merchantable lumber and sold under the contract; that such piles were not composed of culls or timber; that the cull lumber in the stock was piled separately and marked as cull lumber, and that the estimators had no authority to reject or refuse to estimate any of the stock except the timber and culls in pile; that the defendants were solvent, and no grounds existed for the injunction. The amount removed by the defendants, and shipped away to various places, before suit, was stated in the defendant's answer as 256,000 feet, and in the complaint it was charged to be between 300,000 and 400,000 feet. The testimony tends to show that 290,000 feet was shipped away before the 9th of June, and thereafter 2,798,030 feet. The circuit court held that the plaintiff was entitled to relief in equity against the said mistake, and to recover on account thereof $2,182.68, being at the rate of $11 per thousand feet of the lumber not estimated. Exceptions were alleged to the findings above stated, and the plaintiff had judgment, from which the defendants ap-

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pealed. Such points in the evidence as are material to the decision are noticed in the opinion.

For the appellants there was a brief by *Hooper & Hooper*, and oral argument by *Ben. Hooper*.

For the respondent there were briefs by *Alban & Barnes*, attorneys, and *Gabe Bouck*, of counsel, and oral argument by *John Barnes* and *Gabe Bouck*.

PINNEY, J. 1. It was agreed that the estimate of the parties chosen to estimate the amount of lumber sold by the plaintiff to the defendants should *be conclusive*, and the estimate made stands substantially upon the same grounds, and its validity is to be determined by the same principles as are applicable to an award of arbitrators. Their decision ought not to be disturbed, without some statement going to show that it was made under a mistake or was not honest. *Baasen v. Baehr*, 7 Wis. 521; *Hudson v. McCartney*, 33 Wis. 332; *Early v. Chippewa L. Co.* 68 Wis. 112. It was conceded by appellants' counsel that for fraud or gross mistake the estimate in question might be set aside or disregarded. In order to avoid the award for alleged mistake, the evidence should be clear and satisfactory. The mistake to be shown must be of some material fact, as distinguished from mere misjudgment, and not of a trifling or comparatively immaterial character, but one affecting in an important or considerable degree the substantial rights of the party complaining of it. It satisfactorily appears in this case that the estimators wholly omitted to estimate and include in their estimate of the amount of lumber sold by the plaintiff to the defendants, three piles of lumber amounting in all to about 85,000 feet, which, at the contract price of $11 per thousand, would amount to $935. One of these piles was omitted by mistake, and the other two because, though piled as No. 3 lumber, which is a grade better than culls, and not with the piles of culls, the estimators consid-

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ered and decided these piles in fact to be culls and not lumber sold under the contract. The submission in the contract is clear and explicit. The lumber sold was all that there was belonging to the plaintiff in pile at Buttrick's mill, excepting *culls in pile* and timber. The estimators were not authorized to grade or regrade the lumber, for it had already been graded, and reference was made to the result of the grading, in piles having a distinct character. They departed from their authority in omitting these piles as culls, for no authority had been conferred on them to decide that lumber piled as No. 3 was in fact culls, and in so doing they not only exceeded their authority but failed to execute the duty devolved on them by the submission, which required them to estimate *all* the lumber sold and not merely a part of it. A partial estimate was not, therefore, a valid execution of their authority, and is not binding on the parties. It left the entire amount practically at large,—as much so as if no submission and estimate had been made,—and wholly failed to meet the requirements of the occasion, namely, to ascertain and determine what amount of lumber the defendants were to pay for at $11 per thousand under the contract of sale. The rule, undoubtedly, is that the failure to pass upon all the matters submitted is fatal to the whole award, rendering it void. Morse, Arb. 345, and cases in note 1; *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 426. It was claimed that the evidence of the estimators, or their subsequent statements, could not be received to impeach their estimate; but no objection on this ground was made at the trial, and it cannot now be made for the first time on appeal.

2. It was shown that one of the estimators, within about a month after the first estimate, made a measurement of that portion of the lumber which had been estimated and had not then been removed; and this showed, with the measurement of the part removed, that the estimate act-

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ually made was 113,425 feet less than it should have been, making a difference in the amount to be paid to the plaintiff of $1,247.67; and other testimony was given, tending to the same result. This sum, with the former sum added, amounts to $2,182.68, quite an important item, although the bargain was for a large quantity of lumber, amounting in fact to over $34,000. The testimony does not very clearly show whether the mistake last mentioned was the result of gross inattention to duty, a mistake of fact, or the result of misjudgment. The fact that the estimators wholly overlooked one pile of lumber, and, upon actual measurement soon after, the amount so much exceeded the estimate, is not calculated to inspire a belief that they used ordinary care and caution in the discharge of their duty in a matter of such great importance to the parties; and we are impressed by the evidence with the belief that they did not exercise proper care and attention, and that some mistake of fact must have intervened to produce a result so prejudicial to the plaintiff. However this may be, it is not now material to consider, for the parties did not stipulate to be bound or concluded by a partial estimate, even to the extent it went; and by reason of the omission to include the three piles of lumber already mentioned, the estimate reported must be regarded as wholly inoperative. Such an obvious usurpation of authority as the record presents in this respect cannot be tolerated, and would lead, if permitted to stand in this or any similar case, to great injustice.

It appears that it is now impracticable for the estimators to fully execute their authority, as quite a considerable portion of the lumber had been shipped away when this action was commenced, and it appears inferentially from the evidence that it had all been so shipped before the trial, and doubtless it has been divided into divers parcels and sold to many widely-separated parties. One of the estimators appears to be satisfied that the lumber in fact esti-

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mated exceeded the amount reported by 113,425 feet, to say nothing of the three piles not estimated. In case of an attempt to re-estimate it, and a disagreement, the third estimator chosen would have no data or means upon which to base his judgment. Doubtless, the powers of the estimators have now, for these reasons, become impossible of execution, and it was impracticable for the court to recommit the case for another estimate; and the only way in which justice could be done was for the court to hear proof as to the quantity of lumber, and decree according to the evidence produced, as the court did in the present case. We are convinced that the decision of the circuit court is supported by the evidence and is in accordance with the substantial rights of the parties.

3. There was an appeal from the taxation of costs by the clerk, on the ground that too large a sum was taxed for drawing the complaint and making the necessary copies, and for other papers, the excess claimed being $6. The plaintiff's attorneys offered to deduct this sum, if the defendants' attorneys would withdraw their appeal without costs of motion, but they declined to do so. The court deducted $3.65, and refused costs of motion. The printed case does not show that any greater sum should have been deducted, or any error on the part of the court. The granting or refusing costs of the motion, which was principally complained of, was a matter of discretion, with which we see no reason to interfere. The case does not, we think, present any error of which the defendants can complain.

By the Court.—The judgment of the circuit court is affirmed.

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SPAULDING, Respondent, vs. STUBBINGS, imp., Appellant.

October 2 — October 17, 1893.

Partnership: Secret partner: Death of partner: Action on account: Promissory note: Judgment.

1. A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit.
2. A contract between O. and S. recited that O. was engaged in carrying on a general merchandise business, and that S. had theretofore loaned him a certain sum, which was evidenced by a note. It provided that S. should allow said sum to remain with O. for five years; that O. should pay him interest at ten per cent. (the highest legal rate) on said sum and also one half of the net profits of said business, and should keep correct account books of the business, open at all times to the inspection of S.; and that during said term of five years the stock of goods of said business should not be sold out in bulk without the consent of both parties. S. made further advances for the benefit of the business, and was to some extent active in its management, but it was carried on in the name of O., and in letters to him S. referred to it as "your business." It appeared that S. desired that his connection with the business should be kept secret. *Held*, that O. and S. were partners in the business.
3. After the death of O. the business was carried on in the name of his administrator, with full knowledge and permission of S., in all respects as before, without any settlement; and S. continued to make advances to carry it on. *Held*, that the liability of S. as a partner continued.
4. Where an action is upon an account and also upon a note given for a part thereof, and the note is brought into court, the defendants are not prejudiced by the fact that the findings and judgment rest upon the account rather than the note, especially where no interest was allowed.

APPEAL from the Circuit Court for *Oneida* County.

In 1888, *Wilson H. Stubbings*, one of the defendants, resided in Evanston, Ill., and owned and was carrying on a store for the sale of merchandise at Marinesco, Mich.; and John O'Connor was engaged in business in a store in Eagle

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River, Wis., where he resided. The nature of his business does not appear. Under date of August 8, 1888, at Eagle River, *Stubbings* and O'Connor made an agreement in writing, signed by *Stubbings* alone, the terms of which are as follows: "Agreement made between *W. H. Stubbings* and John O'Connor, this day and date, that the said *W. H. Stubbings* is to furnish the said John O'Connor such sums of money as may be agreed between them for the purpose of opening a general store, and is to receive for same interest at the rate of ten per cent. per annum for time it is in the business, payable semi-annually; and the said John O'Connor is to give security on all moneys advanced. The interest is to be paid out of the business, also the expenses of running the store, after which the profits are to be equally divided between the said *W. H. Stubbings* and John O'Connor, which will be done semi-annually, to wit, January 1 and July 1 of each year."

In part execution of such agreement to furnish money, *Stubbings* removed his stock of goods from Marinesco to Eagle River, and placed it in the store in which O'Connor was doing business, and the same became a part of the stock of merchandise in the general store mentioned in the agreement of August 8th, and was accepted by O'Connor as part performance by *Stubbings* of that agreement. *Stubbings* afterwards advanced to O'Connor divers sums of money on account of such business.

April 10, 1889, *Stubbings* and O'Connor had an accounting of the value of the Marinesco stock, and of the further sums of money thus advanced, and thereupon they entered into another written agreement, of that date, which is as follows: "Memorandum of agreement made this tenth (10th) day of April, A. D. 1889, by and between John O'Connor, of Eagle River, Oneida county, state of Wisconsin, and *Wilson H. Stubbings*, of Evanston, Cook county, state of Illinois, *witnesseth* as follows: Whereas the said

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O'Connor is now, and for some time has been, engaged in carrying on a general merchandise business in Eagle River above named; and whereas said *Stubbings* has heretofore loaned to said O'Connor $14,611.50, which he hereby agrees to allow to remain with said O'Connor for a period of five (5) years from May 1st, 1889: *Now, therefore*, in consideration of the above, the said O'Connor hereby covenants and agrees with said *Stubbings* to pay to him interest at the rate of ten per cent. per annum on said sum of $14,611.50 (said sum, with interest thereon, being further evidenced by a note of even date herewith, between the parties hereto), and also one half of the net profits arising from the aforesaid business conducted by said O'Connor. The net profits aforesaid shall include all the profits arising from said business after deducting all current expenses, including rent of store and clerk hire. And said O'Connor hereby agrees to keep a true and correct set of books, showing all the accounts and transactions of said business, which said books and accounts shall be open at all times for the inspection of said *Stubbings* or his agent. This agreement shall bind the parties hereto, their heirs and assigns. It is further agreed that during said term of five years the said stock of goods in said business shall not be sold out in bulk without the consent of both parties hereto." At the same time O'Connor and his wife gave *Stubbings* their judgment note for the above sum of $14,611.50, payable five years after date, with ten per cent. interest, payable annually, and executed a mortgage on certain real estate situate in Oneida county, Wis., to secure the payment of such note. The note contains a stipulation that in case of any default in the payment of interest the whole principal shall become due at the option of *Stubbings*.

The business thus inaugurated at Eagle River was carried on by O'Connor until July 4, 1889, when he died. After his death, and with the knowledge and active co-operation

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of *Stubbings*, the business was continued by the administrators of the estate of O'Connor, who were his wife and his son, George O'Connor,— George having the sole management thereof,— and *Stubbings* continued to advance money to carry it on.

During the lifetime of John O'Connor, plaintiff sold him flour and other supplies to be used and disposed of in the business at Eagle River, and continued to make such sales to George O'Connor after the death of John, for the same purpose.

This action is against *Stubbings* and George O'Connor to recover an unpaid balance of $242.50, alleged to be due plaintiff on account for such supplies, and on a note given him by George O'Connor, as administrator, for a portion of such account for supplies. This note is for $451.49, and eight per cent. interest. It is dated June 29, 1891, and is payable by its terms sixty days after date. If payments be applied to cancel the first items in the account, the whole of such balance, and the portion of the account for which the note was given, accrued after the death of John O'Connor. The action was brought on the theory that *Stubbings* was a partner in the business at Eagle River with John O'Connor, and that his liability as such continued after the death of John. The complaint charges that such partnership existed, which allegation *Stubbings* specifically denies in his answer, which also contains a general denial. George O'Connor did not answer.

Extensive correspondence was carried on between *Stubbings* and John O'Connor during his lifetime, and George O'Connor after the death of his father, relative to the Eagle River business. Ninety letters thus written by *Stubbings* were read in evidence. The character of many of these letters is stated in the opinion. Only one of the letters written by either of the O'Connors to *Stubbings* is in evidence. It was written by George, who claimed therein that *Stubbings* was a partner in the business.

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The cause was tried without a jury, and the material facts found by the court which relate more directly to the question of partnership are as follows: "(1) That on the 8th day of August, 1888, the defendant *W. H. Stubbings* and one John O'Connor (father of the defendant George E. O'Connor) made and entered into an agreement in writing whereby, in substance, said *Stubbings* agreed to furnish said John O'Connor money for the purpose of opening a general store, and for which said O'Connor was to give security and to pay ten per cent. interest semi-annually out of the business, and, after paying the running expenses of the business, the profits of the business were to be equally divided between the said John O'Connor and the said defendant *W. H. Stubbings;* and thereupon and thereafter said merchandise business was conducted and carried on in the village of Eagle River, Oneida county, Wisconsin, for their mutual benefit. (2) On the 10th day of April, 1889, and pursuant to a verbal understanding, and after the money had been furnished by *Stubbings* as agreed, a second and additional agreement was entered into, embodying substantially the first agreement, and further providing that the money furnished in the business by *Stubbings* should remain in the business with said O'Connor for a period of five years from May 1, 1889. (3) That the defendant George E. O'Connor had general supervision of the business from the beginning, and in the absence of John O'Connor had full management and control. (4) That on the 4th of July, 1889, John O'Connor deceased. (5) That thereafter the defendant George E. O'Connor and Ann O'Connor, his mother, were duly appointed to administer on the estate of the said John O'Connor, deceased. (6) That from and after the said 4th day of July, 1889, and until the commencement of this action, without an accounting, and without any adjustment or settlement whatever of the deceased's interest in said business, and without any notice to the contrary, and with

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full knowledge and permission of the defendant *W. H. Stubbings*, the said business was carried on and conducted in all respects the same after the decease of the said John O'Connor as before, except, in place of John O'Connor, the firm name was usually written George E. O'Connor, administrator for the estate of John O'Connor, deceased. (7) That during said time, and after said John O'Connor's decease, the defendant *W. H. Stubbings*, who resided at or near Chicago, continued to furnish money and credit to said firm and business carried on by George E. O'Connor, administrator, etc. (8) That no adjustment or settlement of said business between the defendants or between the estate of John O'Connor and the defendant *W. H. Stubbings* was had or made previous to the commencement of this action."

The remaining findings of fact relate to the plaintiff's account in suit, and fix the balance due him at $693.99. No mention is made therein of the note in suit, but the findings rest on the open account, including the portion thereof for which the note was given. The conclusions of law are as follows: "(1) That the defendant *W. H. Stubbings* was a partner to and with John O'Connor, and liable as such to the plaintiff. (2) That, having continued said business, or permitted the same to be continued, after, in all respects the same as before, the decease of John O'Connor, without an accounting and settlement with the estate of the deceased, and without notice to plaintiff, who continued dealing with the firm, the defendant *Stubbings'* liability as a partner to plaintiff was and is continued. (3) The plaintiff is entitled to judgment as prayed for in the complaint." Judgment was thereupon entered for plaintiff, against both defendants, for the balance thus found due him. Defendant *Stubbings* appeals from the judgment.

For the appellant there was a brief by *Alban & Barnes*, attorneys, and *Gabe Bouck*, of counsel, and oral argument by *John Barnes* and *Gabe Bouck*. They contended, *inter*

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alia, that the receiving of part of the profits in lieu of or in addition to interest does not make the parties partners. *Meehan v. Valentine*, 145 U. S. 624; *Wilson v. Edmonds*, 130 id. 472, 482; *Richardson v. Hughitt*, 76 N. Y. 55; *Curry v. Fowler*, 87 id. 33; *Cassidy v. Hall*, 97 id. 159; *Wilson Printing Co. v. Bowker*, (C. P.) 42 N. Y. St. Rep. 34; *Waverly Bank v. Hall*, 150 Pa. St. 466; *Smith v. Knight*, 71 Ill. 148; *Williams v. Soutter*, 7 Iowa, 435, 446; *Boston & C. S. Co. v. Smith*, 13 R. I. 27; *Horton v. New Pass G. & S. M. Co.* 21 Nev. 184; *Nelms v. McGraw*, 93 Ala. 245; *Mollwo, Marsh & Co. v. Court of Wards*, L. R. 4 P. C. 419, 435; *Badeley v. Bank*, 38 Ch. Div. 238; *La Flex v. Burss*, 77 Wis. 538; *Nicholaus v. Thielges*, 50 id. 492; *Ford v. Smith*, 27 id. 261; *Cooper v. Tappan*, 9 id. 361.

For the respondent there were briefs by *Levi J. Billings*, attorney, and *Miller & McCormick*, of counsel, and oral argument by *Mr. Billings* and *Sam S. Miller*.

LYON, C. J. If defendant *Stubbings* is liable in this action, he is so liable because he was a partner with John O'Connor, during his lifetime, in the Eagle River business, and allowed the business to be continued on the same basis by the administrators of John O'Connor's estate after his death. We have no case here for the application of the doctrine of estoppel against *Stubbings* because he held himself out to plaintiff as a partner in the business. The plaintiff testified he was told by John O'Connor, just before his death, that *Stubbings* had an interest in the business, and that was all. If plaintiff was a competent witness to give this testimony (which counsel for *Stubbings* deny) it fails to prove that *Stubbings* held himself out to plaintiff as a partner with O'Connor in the Eagle River business. It does not appear that plaintiff took the trouble to inquire of *Stubbings* or any other person what that interest was, if it existed, or to ascertain whether the business was con-

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tinued on the same basis after the death of John O'Connor; and there is no satisfactory proof that plaintiff relied upon the fact that *Stubbings* was a partner in the business when he gave credit to John O'Connor, and, after his death, to his administrators. Hence the first and principal question is, Were John O'Connor and *Stubbings* partners *inter se* in the Eagle River business before and at the time of the death of John O'Connor?

Among the numerous definitions of a "partnership" to be found in the treatises on that subject, many of which definitions are collected in 1 Lindl. Partn. 2, and in 17 Am. & Eng. Ency. of Law, 828, we think the definition formulated by Mr. Bates in his late work on that subject is as accurate and satisfactory as any we have seen. This definition seems to be preferred by the learned writer of the article entitled "Partnership" in such encyclopædia. It is as follows: "A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit." 1 Bates, Partn. § 1. It is said by Mr. Lindley that "partnership, although often called a contract, is in truth the result of a contract; the *relations* which subsist between persons who have agreed to share the profits of some business, rather than the *agreement* to share such profits." 1 Lindl. Partn. 2. Hence it is not essential to the existence of a partnership that it be so denominated in the contract of the parties; nor is it necessarily fatal thereto if the parties declare in such contract that they do not intend to become partners. The real inquiry always is, Have the parties by their contract combined their property, labor, or skill in an enterprise or business, as principals, for the purpose of joint profit? If they have done so, they are partners in that business or enterprise, no matter how earnestly they may protest they are not, or how distant the formation of a partnership was

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from their minds. The terms of their contract given, the law steps in and declares what their relations are to the enterprise or business and to each other.

The learned counsel for *Stubbings* contends that only the agreement of April 10, 1889, can be considered in determining the question of partnership. This alone of the two agreements above mentioned is set out and relied upon in the complaint to establish a partnership between *Stubbings* and John O'Connor. While we think the same effect should be given to both contracts, construed together, that should be given to the contract of April 10, 1889, excluding the other, we are willing to adopt the view of counsel, and confine ourselves to giving construction to the latest contract. That instrument in form fixes the amount of money loaned by *Stubbings* to John O'Connor at the sum of $14,611.50, and binds the latter to repay it in five years, with ten per cent. interest, payable annually. The instrument recites that O'Connor is engaged in carrying on a general merchandise business in Eagle River, and provides that he shall pay *Stubbings* one half of the net profits of such business; that O'Connor shall keep correct account books of the business, which shall be open at all times to the inspection of *Stubbings* or his agent; and that during five years the stock of goods in the business shall not be sold in bulk without the consent of both parties thereto. It will be observed that this agreement does not specify what O'Connor had done or should do with the $14,611,50, nor the consideration for the stipulation to give *Stubbings* one half of the net profits of the business. Such share of the profits could not have been given as additional interest, because the agreement provided for paying him the highest legal rate of interest in this state, independently of the profits. Neither was it for services in the business, for *Stubbings* did not stipulate to perform services therein. The conclu-

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sion is almost irresistible that it was inserted to fix the proportionate share of *Stubbings* in the business.

It will also be observed that in the contract of April 10th *Stubbings* did not agree to make any further loans or advances to O'Connor; neither does it contain any provision that O'Connor should be responsible therefor should any further advances be made. *Stubbings* made further advances, however, for the benefit of the business, and it does not appear that any time was fixed for repayment thereof, or that he demanded any voucher or security therefor. It is not reasonable to believe that he would thus have parted with his money if he was not interested with O'Connor in the business as a principal.

Moreover, the letters of Stubbings in evidence show that the proposition to start the business at Eagle River was first made by him; that he purchased much stock for the store; that he advised, if he did not dictate, of whom O'Connor should make purchases, as well as prices and terms; that he arranged for credits; and that he carefully watched and freely interfered with all the details of the business, so far as he could obtain knowledge of those details by persistent requests to the O'Connors to furnish him detailed information thereof. In short, he exercised an influence in, and assumed a control over, the management of the business (which was acquiesced in by the O'Connors) entirely incompatible with the idea that he was merely a creditor of O'Connor for the amount of his advances and interest thereon, which can only be satisfactorily accounted for on the theory that he was handling and directing his own business.

The foregoing considerations impel our minds to the conclusion that, under the contract of April 10th, *Stubbings* and John O'Connor combined their property, labor, and skill in the Eagle River business as principals, and of course

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they did so for their joint profit, for the contract gives each one half the net profits. This makes them partners in the business, within the rule above stated. The contract is strikingly like that under consideration in *Rosenfield v. Haight*, 53 Wis. 260, which this court held created a partnership relation between the parties to it.

The fact that the business was conducted in the name of John O'Connor, and, after his death, in the name of the administrator of his estate, and the further fact that in *Stubbings'* letters to each of them the business was usually referred to as "your business," are not significant, for it appears that, for reasons satisfactory to himself, *Stubbings* desired that his connection with the business should be kept secret.

The finding that the business was continued after the death of John O'Connor in the name of his administrators, or one of them, with full knowledge and permission of *Stubbings*, and was conducted in all respects as before, without any notice to the contrary or adjustment of the partnership business, and that *Stubbings* continued to make advances to carry it on, are fully sustained by the proofs. It requires no argument to show that in such case the liability of *Stubbings* as a partner is continued.

The findings of the court are criticised because they ignore the note sued upon and go upon the open account of plaintiff alone. The note was given for a part of such account, but it is not a payment thereof. The note was brought into court, and the defendants are not prejudiced because the findings and judgment rest upon the original account rather than upon the note. A computation shows that no interest was allowed on the account; hence the judgment is more favorable to defendants than it would have been had it been upon the note.

By the Court.— The judgment of the circuit court is affirmed.

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THE TOWN OF EAGLE RIVER, Respondent, vs. ONEIDA COUNTY, Appellant.

October 2 — October 17, 1893.

Counties: Employment of attorney through agency of town: Action to set aside taxes: Real party in interest.

In an action against a county to set aside certain taxes, two items of which were to pay indebtedness of a town, there was a judgment setting aside said items and sustaining the others, and giving costs against the county. The county appealed from the part of the judgment against it, and the plaintiffs also appealed. The county board authorized said town to employ an attorney to take entire charge of the cause in the supreme court. The town did so, and paid his fees and disbursements. *Held*, that the county was the real party in interest in the action; that it had power to employ, or to authorize the town to employ for it, counsel to attend to the cause in the supreme court; and that it was liable to reimburse the town for said expenditures. Sec. 752, R. S. (requiring the district attorney to prosecute or defend all actions in which the county is interested or a party, "in the circuit court"), is not applicable.

APPEAL from the Circuit Court for *Oneida* County.

The plaintiff town appealed to the circuit court from the action of the county board of *Oneida* county in disallowing a bill for attorney's fees and disbursements paid by said town and presented by it for audit to said county board. The cause was tried by the court without a jury. The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff for the amount of said bill, with costs.

Sam S. Miller, for the appellant, contended that the judgment should be reversed because the facts show no liability on the part of the county to pay the claim; because the plaintiff voluntarily paid the money without being requested to do so by the county; and because it is not equitable, the debt being equitably that of the town, and it having precluded the county from auditing the claim.

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For the respondent there was a brief by *Neal Brown* and *L. A. Pradt*, and oral argument by *L. J. Billings* and *Neal Brown*. They cited *McCrary v. Ruddick*, 33 Iowa, 521; Mechem, Agency, 601.

ORTON, J. The facts of this case are extremely meager, and are very much left to inference or intendment. There is no bill of exceptions, and the only question presented is whether the findings of the court support the judgment. What little record we have here would seem to imply, rather than state, that there were two actions in the circuit court of Brown county, in one of which one G. C. Hixon and others were plaintiffs, and in the other Walter A. Scott, as trustee, was plaintiff, against the county of *Oneida* and others as defendants, for the purpose of setting aside certain illegal taxes, two items of which were to pay certain indebtedness of the town of *Eagle River*. The circuit court found that said two items were illegal and void, and judgment was rendered against the county in both cases, and for costs. The county appealed from those parts of the judgments which set aside said two items of the taxes, and which gave costs to the plaintiffs.

The other facts are in the findings: *First.* "By resolution of the county board of said county, dated June 10, 1891, the town of *Eagle River*, the plaintiff herein, was authorized to employ attorneys to take entire charge in the supreme court" (of said causes). It seems that the plaintiffs in said actions also appealed from those parts of the judgment which were adverse to them, to the supreme court. *Second.* "By virtue of said resolution, and pursuant thereto, the plaintiff town assumed such charge, and employed L. J. Billings, Esq., attorney, to prosecute said appeals in the supreme court." *Third.* On said appeals the said judgments were reversed, and the validity of the

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taxes and of said items thereof was sustained. *Fourth.* An itemized bill of the fees, costs, and disbursements of said attorney in said cases, together with a report of the proceedings, were made and presented to said plaintiff town for payment, as a charge against said county defendant, and said town allowed and paid the same. *Fifth.* Thereafter, on the 28th day of November, 1892, the plaintiff town presented said account so paid, with the report, to the county board of the defendant county, for allowance and payment, and said board wholly disallowed the same. The said town appealed from said order of disallowance to the circuit court.

The conclusion of law was that the plaintiff is entitled to recover against the defendant the sum of $565.75, according to said account so allowed and paid by the plaintiff as aforesaid; and judgment was rendered for the same, with interest and costs, and the county defendant has appealed therefrom to this court.

The first contention of the learned counsel of the appellant is that the county had no interest in the suits, but the town was the real party in interest. The town may have been incidentally interested in those two items of the taxes. All the taxes were sustained except those two items, and the plaintiffs in the actions appealed also. It follows that the county had the main interest in the suits. But the county is the party to be sued in such a case, as the real party in interest, and the town could not be made a party. The duty of defending the actions was on the county alone, and the county is liable for the costs in case of defeat.

Second, it is contended that it was the duty of the district attorney to attend to the suits, and the county is not authorized to employ other attorneys. The statute (sec. 752, R. S.) is cited to this point. That statute makes it the duty of the district attorney "to prosecute or defend all

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actions, civil or criminal, in which the state or county is interested or a party, *in the circuit court.*" These cases were in the supreme court, and the statute is not applicable. It would seem to be a duty, from necessity, for a county to employ legal counsel to attend to cases against it in the supreme court. It has the legal capacity to sue and be sued, and to appeal to the supreme court, and it is its duty, by implication, when it has a case pending in the supreme court, to attend to it and see that it is properly presented to that court; and connected with such a duty it must have the *power* to employ legal counsel for such purpose, and if he has such power it must have the power to direct or authorize some one to employ such counsel for and on its behalf. Municipal corporations, as well as others, must act through agents. Here it authorized the town to act as its agent in employing counsel to attend to these cases in the supreme court. The town accepted this agency, and not only employed counsel but paid his fees and disbursements. The town, being incidentally interested, might well accept such an agency. It cost the town $565.75, which it expended in this business of the county, and there is an implied liability of the county to reimburse the town. But, even if this power was doubtful, it was an executed contract, and for the benefit of the county, and the town has expended this amount for the benefit of the county, and the county is equitably estopped from now denying its liability. The appeals were successful, and the county was benefited by the care and labor it authorized and employed the town to expend and bestow in this business. But we do not think the *power* was wanting.

The judgment appears to be just and fair, and there does not appear to be any legal error in the record. The findings clearly support the judgment.

By the Court.— The judgment of the circuit court is affirmed.

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PEWAUKEE MILLING COMPANY, Appellant, vs. HOWITT, Respondent.

October 3 — October 17, 1893.

Landlord and tenant: Covenant to make improvements: Notice to corporation: Duty of lessee: Measure of damages.

1. In a lease of a mill the lessor, a corporation, covenanted to put in a water wheel of not less than fifty horse power "if required by the lessee." *Held*, that it was not necessary that a formal notice should be given to the board of directors of the corporation that the wheel was required, but it was enough that a request therefor was made of its officers in charge of the business.
2. The lessor having failed to perform the covenant, but having put in a wheel which did not furnish more than thirty horse power, the lessee was not bound, in order to lessen his damages, to put in a new wheel or to reset or alter the one put in so that it would furnish more power. *Poposkey v. Munkwitz*, 68 Wis. 331, distinguished.
3. The lessee had the right to continue in possession and pay rent and hold the lessor responsible for the damages resulting from its failure to perform the covenant, if he did not acquiesce in or accept the wheel so put in as a performance.
4. It not appearing that the lessee had a like business already built up which might serve as a basis for the allowance of prospective profits, the measure of damages was the difference between the rental value of the premises with the specified wheel and their rental value with the wheel actually put in.

APPEAL from the Circuit Court for *Waukesha* County.

This action was brought on the covenant in a lease for the payment of rent to the plaintiff by the defendant for a certain grist mill leased by the former to the latter for three years at the rate of $900 for the first year, $1,000 for the second, and $1,200 for the third year, the plaintiff "agreeing to put in a water wheel of not less than fifty horse power within ninety days from March 1, 1888, if required" by the lessee, the defendant. The defense by way of counterclaim was that the defendant required the wheel to be put in as provided in the lease; that the plaintiff did

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cause one to be put in within the specified time, but it had failed to furnish more than twenty-five horse power, and often not more than fifteen, with which to run the mill; that the defendant frequently and continuously protested and complained of such failure; that by reason thereof the defendant had been damaged in the sum of $3,000.

Evidence was produced on the part of the defendant tending to show that he went into possession of the mill March 1, 1888, and within thirty days thereafter he demanded the wheel provided for by the lease, of Jameson and Sawyer, two of the parties, the former a director and vice president, and the latter the secretary, of the plaintiff, with whom he negotiated the lease, and who had charge of the rent accounts for the plaintiff; that the wheel was afterwards put in by one Blodgett, doing the work under a contract with the plaintiff to complete it to the satisfaction of the defendant, the lessee; but it did not appear that the defendant had knowledge of the terms of this contract; that the wheel did not furnish more than twenty-five or thirty horse power, and part of the time much less, and that the defendant notified Sawyer and Jameson that the wheel was not proper; that it was not set right, and that the water discharge was not right; that, after it was put in, the defendant informed Jameson that the wheel ran well, but at the same time told him that he thought there was something deficient about the wheel, that there was not enough wheel pit under it, or it was set too low; that the defendant was not an expert in respect to wheels; that the wheel did not give any more power with full gate than half gate, but apparently less, and that there was no lack of water. An expert testified that the wheel would give the required amount of power if properly set, and that the space below the wheel for the discharge of water was only two feet, and lacked four feet of being sufficient; that the water could not escape fast enough, causing the wheel to

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work in dead water, and that in consequence it lost fifty per cent. of its power. The defendant testified that after the wheel was put in he saw there was something the matter, but could not tell what it was; that he judged it was not set right. "I said I had not had experience enough to say. Did not know exactly what I wanted to have done."

Evidence was given tending to show that the difference in the rental value, in consequence of the diminution of power from fifty to twenty-five horse power, was sixty per cent.; that, if worth $3,000 for three years, a twenty-five horse power would be worth fifty per cent. more with fifty horse power. There had been considerable evidence given to show the prospective profits of operating the mill with fifty horse power over the profits that would be derived with twenty-five horse power, but the court finally held that the proper rule of damages was the difference in rental value per annum.

On the part of the plaintiff evidence was given to rebut the defendant's case, and tending to show that the defendant was to oversee the putting in of the wheel; that he had made no complaint about the wheel, and that a month or more after it was put in the plaintiff paid Blodgett for the wheel, and that the wheel could have been taken down and properly reset at an approximate expense of $200 aside from delay caused by shutting down. It was also claimed that the defendant, by failing to complain of the wheel before plaintiff paid Blodgett, and by making subsequent payments of rent, had lost the right by acquiescence to complain of the wheel.

The circuit court ruled that it was sufficient if the jury found from the evidence that defendant substantially informed the officers of the plaintiff that he wanted the wheel put in; that it was not necessary that he should use the word "require" or "demand," and that the request need not be in writing; that if the defendant did commu-

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nicate to the officers of the plaintiff his desire to have the wheel put in, it was sufficient; that the lease required it to be put in properly; that the company was bound to set it properly for the purpose for which it was to be used, and submitted the question whether this requirement had been complied with; also that the defendant, if he had knowledge of the subject, might acquiesce in the wheel, and accept it as a sufficient compliance of the lease, and be bound by it, but if the defendant had no particular knowledge of wheels, not knowing its defects or being capable of judging them, he was not bound by any acquiescence; that he might pay the full amount of rent as it came due under the lease, and still recover damages which the jury might find he had sustained by reason of any default on the part of the plaintiff. The circuit court withdrew from the jury all testimony in regard to profits or loss of profits as affecting the question of damages, and instructed the jury that the rule of damages was the difference in the rental value of the mill between a fifty horse power wheel, and, say, a twenty-five or thirty horse power, as they might find the fact from the evidence, and that they were only to consider the testimony in regard to the rental value of the mill.

The jury assessed the defendant's damages at $1,680, being $680 in excess of the plaintiff's demand. The plaintiff moved for a new trial on the ground that the verdict was contrary to law and evidence, and for misdirection of the circuit judge in the respects above mentioned. The court denied the motion, and the defendant had judgment on the verdict for his damages and costs, from which the plaintiff appealed.

For the appellant there was a brief by *Haight & Pierce*, and oral argument by *T. W. Haight*. To the point that the setoff or recoupment should be limited to the amount for which defendant might have had the wheel reset so as

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to develop the required power, th y cited 3 Suth. Dam. (2d ed.), sec. 873, and cases cited; *Varner v. Rice*, 39 Ark. 344; *Lewis v. Pepin*, 33 La. Ann. 1417; *Poposkey v. Munkwitz*, 68 Wis. 331-3; *Young v. Burhans*, 80 id. 438, 442; *Cook v. Soule*, 56 N. Y. 420.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

PINNEY, J. 1. The meaning which appellant's counsel contend should be given to the provision in the lease, the plaintiff agreeing to put in a water wheel of not less than fifty horse power, "if required by the lessee," to the effect that a formal notice that the wheel was *required* should have been given to the board of directors, inasmuch as it did not appear that any delegation of authority had been made to any one to receive such notice, is too narrow and technical. The defendant had a right, at his option, to have a new wheel of the described power put in the mill. The plaintiff is a manufacturing corporation, and request was made to its vice president and secretary to put in the wheel. This is clear from the evidence and from the contract they made with Blodgett to put in a wheel, etc., "to the satisfaction of *Mr. Howitt*, lessee of the mill." The transaction of business with such a corporation does not require any such formality and strictness as that insisted on. It is enough that the request was made of its officers in charge of its business. The charge of the court on this subject was manifestly correct, and the defendant's request made it the legal duty of the corporation plaintiff to put in the specified wheel and see to it that it met the requirements of the covenant. There is nothing ambiguous in the covenant, and parol evidence to show why it was inserted in the lease was properly excluded.

2. It is contended that upon the refusal or neglect of a lessor to repair on receiving notice, the lessee is entitled to

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do so at the former's expense, and that such is his duty where it may be done at trifling expense; that he cannot neglect it and recover greater damages, suffered in consequence of the premises remaining out of repair, than such repairs would cost. Suth. Dam. § 873, and cases cited in note. We do not think the present case falls within the rule invoked. The case is not the ordinary one of *repairs* which might be made at trifling expense, but, instead, an express covenant to reconstruct and enlarge the capacity of the mill by building over or substituting a new motive power, involving the skill and knowledge of experts in hydraulics and mill building, in respect to which the defendant, it is shown, had no special experience or skill. Failure on the part of the lessor plaintiff to perform its covenant in this respect could not have the effect to impose upon the lessee the risk of success or failure in putting in or setting a *new* wheel, a risk which might involve the lessee in uncertainty of result and damage to the mill or power, and consequent risk and loss. The burden is one which the lessor had expressly taken upon itself, and which it was in every respect proper it should bear. Therefore the defendant was not bound to put in a new wheel, the expense of which it seems was about $800, or to reset or alter the one put in, or its surroundings, the doing of which the evidence tends to show would cost not less than $200. For a failure on the part of the plaintiff in these respects the defendant is entitled to recover the consequent damages. The case is clearly distinguishable from those cited and relied on by the plaintiff's counsel. *Myers v. Burns*, 35 N. Y. 269, 272; *Cook v. Soule*, 56 N. Y. 420, 423; *Hexter v. Knox*, 63 N. Y. 561. The defendant had a right to continue in possession and pay the rent and hold the plaintiff responsible for the damages suffered in consequence of its failure to perform its covenant, if he did nothing to acquiesce in the work of putting in the wheel as a satisfaction of the covenant; and mere payment

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of rent would not be such acquiescence, as the covenant to pay rent on the one hand, and put in the required wheel on the other, were independent covenants. *Young v. Burhans*, 80 Wis. 438; *Pryor v. Foster*, 130 N. Y. 178; *Dennison v. Grove*, 52 N. J. Law, 144; *Cook v. Soule*, 56 N. Y. 420; *Hexter v. Knox*, 63 N. Y. 561; *Lunn v. Gage*, 37 Ill. 19. The case is analogous to that of *Hinckley v. Beckwith*, 13 Wis. 31, in which, as in this, the cost of the work required of the lessor was not trifling or inconsiderable. In that case it is stated by COLE, J., that "the evidence shows that the injury to the engine was serious, and it is questionable whether it could have been easily repaired. Certainly it would have taken some time to repair it, and there were only two months of the lease unexpired;" and the decision in that case is not in conflict with the rule relied on by the defendant. 3 Suth. Dam. § 873, and cases cited in note. We are therefore of the opinion that the defendant was under no obligation to put in the wheel, or to attempt to reset it or alter its surroundings, but might, without so doing, recover his full damages by reason of the plaintiff's failure to perform its covenant. The case is clearly distinguishable from *Poposkey v. Munkwitz*, 68 Wis. 331, which occurred in the city of Milwaukee, where the lessee had been evicted, and it was reasonable to suppose he might readily rent another store wherein to carry on his business, and that in good faith he should have attempted to do so. Failure on the part of the plaintiff to keep its covenant did not amount to an eviction, and, if it did, it would be unreasonable to suppose that the lessee could get another mill in which to carry on his business, without changing his residence.

3. Inasmuch as the payment of rent by the defendant was not *per se* evidence of acquiescence in or acceptance of the wheel as a compliance by the plaintiff with its covenant, the foregoing considerations show that continued use of the mill would not be available as such, for the defendant

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might, notwithstanding, sue upon the covenant and claim damages for its nonperformance. In view of the evidence and what the defendant told Jameson, the plaintiff's vice president, that the wheel ran well, but he thought there was something deficient about it, that there was not enough wheel pit under it, and that it did not seem to run under a full head as it ought to; and of the testimony of Jameson and others on that subject,— we cannot think that the plaintiff was prejudiced by the instructions of the circuit court on the subject of acquiescence or satisfaction with the wheel.

4. The rule of damages applied to the case by the circuit court was the proper one, namely, the difference between the rental value of the premises with the specified wheel, and their rental value without it. 2 Suth. Dam. § 872; *Cook v. Soule*, 56 N. Y. 420; and cases hereinbefore cited. No case was made for the allowance of prospective profits as damages, which at best are conjectural and uncertain, and an allowance of which is liable to operate unjustly and oppressively. *Wright v. Mulvaney*, 78 Wis. 97; *Bierbach v. Goodyear R. Co.* 54 Wis. 208; *Anderson v. Sloane*, 72 Wis. 566. It does not appear that the defendant had a like business already built up which might justly serve as a basis for such allowance, and the court very properly withdrew from the consideration of the jury all evidence on the subject of profits as damages, and directed the assessment of damages on the basis of difference in rental value of the mill, as already stated. *Poposkey v. Munkwitz*, 68 Wis. 322. This rule, it is evident, the jury followed, and there is reason to think that it was more favorable to the plaintiff than the other. There was, we think, sufficient evidence before the jnry to enable them to apply this rule.

It follows that the judgment of the circuit court is correct, and must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

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VOSBURG, Respondent, vs. PUTNEY, Appellant.

October 3 — October 17, 1893.

Assault and battery: Exciting cause of injury: Aggravation by previous disease: Expert testimony: Instructions to jury.

1. **One who kicked another is liable for an injury of which such kick was the exciting cause and which was its natural consequence, although the physical condition of the person kicked may have aggravated the injury.**
2. **The question as to what was the exciting cause of an injury following a kick on the leg of a person, is a proper subject for expert testimony.**
3. **Defendant having testified that he touched plaintiff's son with his foot, a statement in the charge to the jury that he kicked him is not ground for a reversal.**

APPEAL from the Circuit Court for *Waukesha* County.

This action was brought to recover damages for an assault and battery alleged to have been committed by defendant upon Andrew Vosburg, the minor son of plaintiff, which resulted in putting plaintiff to great trouble and expense in and about nursing and attempting to heal his son while suffering from the injuries thus received, and while disabled thereby, and subjecting plaintiff to the loss of services of his son. The injury complained of was committed February 20, 1891, and was caused by a kick inflicted by defendant on the leg of Andrew a little below his knee. The transaction occurred in a schoolroom in Waukesha during school hours, defendant and Andrew both being pupils in the school. Andrew was then a little over fourteen, and defendant a little less than twelve, years of age.

A suit for the same assault and battery was brought by Andrew against defendant, and has been twice in this court on appeals. See 78 Wis. 84, and 80 Wis. 523, where full statements of the facts out of which this action arose will be found.

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On the trial of the present action the court refused to direct a verdict for defendant. The jury found for the plaintiff, and assessed his damages at $1,200. A motion for a new trial was denied, and judgment for plaintiff entered pursuant to the verdict. Defendant appeals from the judgment.

T. W. Haight, for the appellant.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

LYON, C. J. 1. The proofs in the present case are substantially the same as in the case of *Vosburg v. Putney*, 78 Wis. 84, and 80 Wis. 523. This action by the father is predicated upon the same transaction, proof of which was there held sufficient to support a verdict for the son. Manifestly the same proof will support a verdict for the father. It was not error to refuse to direct a verdict for defendant.

2. The court refused to give several instructions proposed on behalf of defendant. The first of these is upon the subject of an implied license to defendant to kick plaintiff. That question was disposed of in the opinion in 80 Wis. 523. There was no testimony which would have supported a finding that there existed any such license. Although the court submitted the question to the jury, it was unnecessary, and it would have been error had the jury determined it against plaintiff. The second and third proposed instructions are to the effect that if the disease by which Andrew lost the use of his leg existed in the leg before the injury complained of was inflicted, and such injury merely served to accelerate its progress, or to locate the point of suppuration, and was not the original cause thereof, or if the proximate cause of the inflammation in the leg was the presence of pus germs which obtained entrance by way of a previous wound above the knee, the plaintiff could not recover. The proposed instructions do not state the law

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correctly. The learned circuit judge correctly instructed the jury on this branch of the case that if the kick inflicted by defendant upon Andrew was the exciting cause of the injury complained of, and such injury was the natural consequence of the kick, the defendant was liable therefor, although Andrew's physical condition might have aggravated the injury. The only remaining proposed instruction related to the alleged negligence of plaintiff to properly care for Andrew's leg. There is no testimony which would support such an instruction.

3. Some of the exceptions to the charge of the court to the jury are disposed of by what has already been said. Only a single objection thereto calls for further notice. The court said it was undisputed that defendant kicked across the aisle in school, and hit Andrew Vosburg on the leg below the knee. The defendant testified that he reached over the aisle with his left foot, and touched Andrew's leg. On this testimony it is claimed that the instruction was erroneous. The charge is that he kicked Andrew. The testimony of defendant is that he touched him with his foot. We do not think that the difference in the signification of these terms, to wit, a kick and a touch with the foot, is sufficient to justify the reversal of a judgment in a case where the former has been employed as the equivalent of the latter.

4. The only remaining assignment of error is that the court erred in permitting medical witnesses to give their opinions as to what was the exciting cause of the injury to Andrew. We think that it was a proper subject for expert testimony, and hence that the error is not well assigned.

By the Court.—The judgment of the circuit court is affirmed.

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LARSON, Appellant, vs. THE AULTMAN & TAYLOR COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

October 17 — November 7, 1893.

(1) *Limitation of actions: Foreign corporations.* (2–4) *Sale of chattels: Latent defects: Warranty by agent: Offer to return.*

1. A foreign corporation is a person "out of this state," within the meaning of sec. 4231, R. S., which provides that "if, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced" within the time limited, after such person shall return to or remove to this state.
2. In an action for damages by reason of defects in machinery purchased, the evidence being conflicting as to whether the defects were patent, it was error to charge the jury that plaintiff, having purchased the machinery with full opportunity for inspection, could not recover on account of the defects.
3. Where it is shown to be the general custom for local agents selling mill machinery to warrant the same, the purchaser may recover from the principal for a breach of a warranty by the agent.
4. Where the capacity of machinery was unknown to the vendee and he bought it relying upon the warranty of the vendor, he may recover for a breach of the warranty, although he kept and used the machinery for some time after discovering its defective character or want of capacity, before notifying the vendor thereof or offering to return the machinery.

APPEALS from the Circuit Court for *Eau Claire* County.

This action was commenced March 6, 1891, against the defendant, a corporation organized under and by virtue of the laws of Ohio. The complaint alleges, in effect, that July 31, 1884, at Menominee, Wis., the defendant sold and delivered to the plaintiff certain machinery to be used in and about the plaintiff's sawmill in Barron county, upon a warranty that the said machinery would do good work and be of good quality and capable of sawing from twenty-five to thirty-five thousand feet of pine lumber per day, and

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be fit for the purposes of manufacturing lumber in the plaintiff's mill; that the plaintiff, relying upon said warranty, purchased said machinery; that said machinery was not of as good quality as warranted, nor capable of sawing any more than 10,000 feet of pine lumber per day; that a part of said machinery consisted of a second-hand rotary saw, which was old and worthless, and not of the kind ordered by the plaintiff; that after a fair trial the same was returned by the plaintiff to the defendant as not complying with said warranty; that the defendant received the same, and sent another worthless saw in lieu thereof; that by reason of the facts stated the plaintiff was damaged in the sum of $1,365; that the plaintiff had given the defendant on said purchase two negotiable promissory notes of $325 each, and that both of them had been sold by the defendant to innocent purchasers thereof; that the plaintiff had unsuccessfully attempted to defend against one of them, and was liable to pay both.

The answer consists of admissions and denials, and in effect alleges that the plaintiff kept and used the first saw named for several months, and by his own negligence burned and injured the same, and then returned it to the defendant and requested the defendant to send to him a Henry Disston fifty-two inch saw, fifty-two teeth, six by seven gauge; that at such request the defendant did order for, and cause to be sent to, the plaintiff, such Henry Disston saw, and directed him that if he should desire to return it he should do so directly to the makers, Henry Disston & Sons; that the machinery so sold to the plaintiff was examined and inspected by the plaintiff before purchasing, and was in good order and fit for sawing lumber; that the defendant had from the time of purchase, and ever since has had, and now has, agents in this state, conducting its business therein; that the pretended cause of action alleged arose in this state, and took place more than

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six years prior to the commencement of this action, and is therefore barred by sec. 4222, R. S.

At the close of the trial the jury returned a verdict to the effect that they found against the defendant and assessed the plaintiff's damages at $145.08. From the judgment entered thereon accordingly, each party appeals to this court.

For the plaintiff there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*. To the point that a foreign corporation cannot plead the statute of limitations, they cited *Olcott v. Tioga R. Co.* 20 N. Y. 210; *Rathburn v. N. C. R. Co.* 50 id. 656; *Boardman v. L. S. R. Co.* 84 id. 157; *North Mo. R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; *Tioga R. R. v. Blossburg & C. R. R.* 20 Wall. 137; *Robinson v. Imperial S. M. Co.* 5 Nev. 44; *State v. Cent. Pac. R. Co.* 10 id. 47; *Thompson v. Tioga R. Co.* 36 Barb. 79; *Kirby v. L. S. R. Co.* 14 Fed. Rep. 261; *Blossburg & C. R. Co. v. Thompson*, 5 Blatchf. 387; *Winney v. Sandwich Mfg. Co.* 53 N. W. Rep. (Iowa), 421; Wood, Lim. of Act. 490.

W. P. Bartlett, for the defendant, to the point that a foreign corporation could plead the statute of limitations, cited *McCabe v. Ill. Cent. R. Co.* 4 McCrary, 496, 13 Fed. Rep. 827; *Express Co. v. Ware*, 20 Wall. 543; *Ex parte Schollenberger*, 96 U. S. 369–376; *Wall v. C. & N. W. R. Co.* 69 Iowa, 498; *Omaha & F. L. & T. Co. v. Parker*, 33 Neb. 775; *Bristol v. C. & A. R. Co.* 15 Ill. 436; *Bank of N. A. v. C., D. & V. R. Co.* 82 id. 495; *Penn. Co. v. Sloan*, 1 Bradw. (Ill.), 364; *Hass v. Cent. R. & B. Co.* 66 Ala. 472.

CASSODAY, J. It is conceded that the defendant is a corporation created and organized under the laws of Ohio. It exists only in contemplation of, and by force of, the law of that state. Since such law has, of itself, no extra-territorial force, the corporation cannot migrate to another state, but

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must dwell in the state of its creation. *Bank of Augusta v. Earle*, 13 Pet. 588; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286; *Shaw v. Quincy M. Co.* 145 U. S. 449, 450. While it can only live and have its being in that state, yet its residence there creates no insuperable objection to its power to contract in other states, and having its legal existence recognized in such other states. *Ibid.* A suit against a corporation in a court of the United States is regarded as brought against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the state in which the corporation was created. *Muller v. Dows*, 94 U. S. 444; *Railway Co. v. Whitton*, 13 Wall. 270; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286. Foreign corporations are not compelled to do business in this state. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature has seen fit to impose. *State v. United States Mut. Acc. Asso.* 67 Wis. 629; *Stanhilber v. Mut. M. Ins. Co.* 76 Wis. 291; *Paul v. Virginia*, 8 Wall. 181; *Philadelphia Fire Asso. v. People*, 119 U. S. 117; *Fritts v. Palmer*, 132 U. S. 282. The defendant, by voluntarily doing business in this state, thereby voluntarily submitted itself to the laws of this state. *Ibid.*

The learned counsel for the defendant contends that the plaintiff's cause of action is barred by the six years limitation prescribed by sec. 4222, R. S., as pleaded in the answer. Among the exceptions to that statute is the one which declares that "if, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after such person shall return to or remove to this state." Sec. 4231, R. S. The words, "if . . . he shall be out of this state," found in the exception thus quoted, have been construed by this court to apply to the mere temporary absence of a resident of the state. *Parker v. Kelly*, 61 Wis.

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552. The opinion of Mr. Justice ORTON in that case, and the adjudications there cited, seem to dispose of the question suggested in the case at bar, if the defendant is subject to the same rule as a personal defendant. Speaking of the clause quoted, as found in the New York Code, Mr. Chief Justice FULLER, in a recent case, and commenting upon the decisions in that state, in effect said that as to the statute of limitation there were two exceptions to its operation, and that one was "where the debtor was absent from the state *when* the cause of action accrued," and that under that exception mere "absence was sufficient to avert the bar, because the statute did not commence to run until the return of the debtor into the state, and such return . . . must be open and notorious, so that a creditor might, with reasonable diligence, find his debtor and serve him with process." *Barney v. Oelrichs*, 138 U. S. 534, citing *Engel v. Fischer*, 102 N. Y. 404, where numerous other cases are cited. In a more recent case, Mr. Justice GRAY, speaking for the whole court, in respect to a similar clause in a Kansas statute, said: "It was therefore rightly held by the circuit court that the statute of limitations did not run while the debtor was personally absent from the state, notwithstanding that he continued to have a usual place of residence in the state, where service of a summons could be made on him." *Bauserman v. Blunt*, 147 U. S. 657. In that case it was held that the construction given by the supreme court of a state to a statute of limitations of the state would be followed by that court. *Sanborn v. Perry*, *post*, p. 361.

But counsel further contends that a foreign corporation is not a nonresident, in the sense that it cannot plead the statute of limitations, and he cites adjudications to that effect. In *Tioga R. R. v. Blossburg & C. R. R.* 20 Wall. 137, it was held: "The highest courts of New York, construing the statutes of limitations of that state, have decided that a foreign corporation cannot avail itself of them;

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and this, notwithstanding such corporation was the lessee of a railroad in New York, and had property within the state, and a managing agent residing and keeping an office of the company." 147 U. S. 654. See *Thompson v. Tioga R. Co.* 36 Barb. 79; *Olcott v. Tioga R. Co.* 20 N. Y. 210; *Rathburn v. N. C. R. Co* 50 N. Y. 656. Under our statutes, the word "person," as used in the clause quoted from sec. 4231, R. S., "may extend and be applied to bodies politic and corporate, as well as to individuals." Subd. 12, sec. 4971, R. S.

Such being the law applicable, it is obvious that the defendant was "out of the state" when the plaintiff's cause of action accrued, within the meaning of our statutes. We must hold that the plaintiff's cause of action is not barred by the statute of limitations pleaded. It follows that the exceptions of the defendant must be overruled, and that the judgment, in so far as it is questioned on the defendant's appeal, must be affirmed.

The question recurs whether any of the errors assigned in behalf of the plaintiff are available. The evidence on the part of the plaintiff tends to prove, in effect, that the machinery purchased by him of the defendant consisted of the tracks or a portion of them, the carriage with trucks, three head blocks with set works, a rack and pinion feed, a double rotary with boxes to it, a top-saw rig with belts, intermediate pulleys, and traction pulleys, and shaft with pinion on, one drive belt and two or three smaller belts, and two saws; that both the rotary and top saws were used for sawing logs, but the top saw was only to be used when the logs were so large that they could not be sawed with the other; that such other saw was to be a fifty-two inch Henry Disston saw, six by seven gauge, scant in thickness, fifty-two teeth; that the defendant's agent warranted the mill to cut from twenty-five to thirty-five thousand feet per day; that it was customary for local agents having the

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sale of such machinery to warrant the same; that most of the mill or machinery, including the arbor, was present when the plaintiff made the purchase, July 31, 1884; that the double rotary, the carriage, and what went with it, except a pinion, were not there; that the machinery so present appeared to be all right; that the machinery was put in the mill in October; that the saw came about the middle of November; that the mill started about November 20, 1884; that it commenced manufacturing lumber about December 1, 1884; that it would not or could not manufacture heavy lumber; that something was always giving out; that the arbor was right-handed instead of left-handed, that is to say, the thread or screw was cut the wrong way, so that the motion of the saw would loosen it instead of making it more tight as it should; that the temper was out of the saw, and that could be seen at once; that the second saw had a flaw in it, and the teeth kept breaking; that before December 24, 1884, the plaintiff notified the defendant's agent that the saw would not work, but got no reply; that December 27, 1884, the plaintiff returned the saw to the agent of the defendant; that he ordered and received another saw of the defendant, and that that was defective; that he was compelled to have the arbor changed in the particular mentioned; that the bearings of the trucks were cast iron instead of steel, and failed to work properly; that the plaintiff thereupon inquired of the defendant the price of a new set, and, on being informed, bought a set cheaper elsewhere; that he had to put wider pulleys on the shaft of the feed works, and get new belts for the same; that one pinion was all right, but the other was too small and had to be returned with the saw; that the timber of the carriage was pine, and painted, and the fact that it was not hard wood was not, for a time, observed. That the plaintiff had in the mill other machinery, which he could not or did not purchase of the defendant, including a rack and

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pinion feed, edgers, and trimmers; that after the mill was repaired and the defects remedied the mill was incapable of manufacturing, on an average, more than 10,000 feet of lumber per day. Such is a general outline of the testimony on the part of the plaintiff. The essentials of that testimony are flatly contradicted by evidence on the part of the defendant, much of which is strongly corroborated by circumstances of a convincing character.

The court submitted the case to the jury on the theory that there was an implied warranty that the saw and arbor and pulleys, and some other parts of the machinery, were reasonably fit for the purpose for which they were purchased, unless the plaintiff knew of such defects at the time of purchase, and the verdict is based upon the defects so submitted. The court, among other things, charged the jury to the effect that it appeared from the evidence that the plaintiff's son was an experienced man in the operation of sawmills of this character; that all the parts, except the large saw, were at the time of the purchase open to inspection and examination by the plaintiff and his son who was acting for him, and that all such defects *were patent*,— that is, they were open and visible and would readily have been discovered by an experienced man in the business, upon inspection; that in such cases the law is well settled that the plaintiff is presumed to have purchased with knowledge, unless there was an express warranty by the defendant that the machinery was different in kind and material from what was apparent upon mere inspection; that in this case there was no such express warranty,— that is to say, there was no evidence to show that the mill was warranted to be of any different material or make than what it actually was. In the portions of the charge referred to, the learned trial judge was manifestly seeking to follow, and substantially did follow, the principles sanctioned by this court in *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*,

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42 Wis. 626; *Olson v. Mayer*, 56 Wis. 551. As to such parts of the machinery as had no defects except such as were patent, the portion of the charge mentioned may be unobjectionable; but it may be doubtful whether the undisputed evidence was such as to justify the court in taking the question of latent defects and waiver from the jury, as to all the machinery except the large saw. The court did, however, take such question from the jury, and in effect expressly charged that the plaintiff having purchased the mill, as he did, with full opportunity for inspection, and having kept and used it for a considerable time after he had actual knowledge of its defective character, if it was defective, without complaint or offering to return it in the condition in which it was, he could not recover damages on account thereof. Under the evidence, we think this was misleading, and hence error.

The rulings of the court on the admission of evidence are upon the theory that the defendant's local agent who sold the machinery to the plaintiff had no authority to expressly warrant the same or any part of it; and a portion of the charge is to the effect that, under the testimony, there were great doubts whether the defendant ever warranted the mill to cut from twenty-five to thirty-five thousand feet of lumber per day, as the evidence tended to prove that the warranty, if made, was that of the agent merely. The rule is settled in this state that an agent employed to sell has no implied power to warrant, unless the sale is one which is usually attended with warranty. *Pickert v. Marston*, 68 Wis. 465. In the case at bar, there is evidence to the effect that it was the general custom of local agents to warrant such machinery, when selling it. Such being the law and the evidence, we must hold that such rulings of the court upon the contrary theory mentioned were erroneous, and that the portion of the charge referred to was misleading.

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In the same connection the court further said to the jury, in effect, that it appeared from the evidence that the son, at the time of the purchase, expressed doubt as to the ability of the mill to saw the quantity named; that there was no special damage alleged as to the mill's inability to manufacture that quantity; that the testimony was too indefinite and uncertain to hold that it would not; that the number of hours contemplated to constitute a day was not stated, nor whether it would require a change of saws at intervals in the day, nor whether it was to be accomplished in connection with other machinery in the mill, such as edgers, trimmers, and like machinery; that it was common knowledge that the rotary sawmill was but a small part of a sawmill proper, and that the capacity of the mill depended largely upon the entire machinery, the class of logs, location, and experience, quickness, and number of men employed in all its departments. The indefiniteness and uncertainty mentioned may have called, and probably did call, for special instructions to the jury, thus narrowing the question down to just what, if anything, was covered by the alleged warranty; but they did not, as we think, authorize the judge to determine the question against the plaintiff, as a matter of law. The defendant's alleged warranty as to the capacity of the mill, as presented in the record, must be regarded as only applicable to the mill when operated under favorable circumstances and conditions. If the capacity of the mill was unknown to the plaintiff or his son at the time of the purchase, and the defendant actually warranted such capacity, and the plaintiff made the purchase relying upon the same, and there was a breach of the warranty, as alleged, then we perceive no reason why the plaintiff should be precluded from recovering his legitimate damages therefor, notwithstanding his failure to return or offer to return the mill or the defective parts, or to notify the defendant of such defects or want

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of capacity. *Neave v. Arntz*, 56 Wis. 174; *Winkler v. Patten*, 57 Wis. 405; *Vates v. Cornelius*, 59 Wis. 615; *Buffalo B. W. Co. v. Phillips*, 67 Wis. 129; *White v. Stelloh*, 74 Wis. 435; *Barnes v. Burns*, 81 Wis. 232.

As the case must be retried upon a new theory and perhaps new evidence, we do not feel called upon to consider the important questions which may arise as to the proper measure of damages.

By the Court.— The judgment of the circuit court is reversed on the plaintiff's appeal, and the cause is remanded for a new trial.

THE CITY OF EAU CLAIRE, Appellant, vs. MATZKE, Respondent.

October 17 — November 7, 1893.

Municipal corporations: Encroachment on street: Mandatory injunction.

A city may maintain an action in equity against a lot-owner to obtain a mandatory injunction compelling removal of buildings which encroach upon or obstruct a public street.

APPEAL from the Circuit Court for *Eau Claire* County.

The case is stated in the opinion.

L. A. Doolittle, for the appellant.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

WINSLOW, J. This is an action in equity, brought by the city, to obtain a mandatory injunction compelling the defendant to remove certain buildings owned and maintained by defendant, and which are alleged to encroach upon a public street in the city and obstruct a public alley, and

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which defendant refuses to remove. A general demurrer to the complaint was sustained on the ground that the remedy at law was adequate. It must now be considered as well settled in this state that a city or village, in its corporate capacity, may maintain an action in equity to prevent threatened obstructions or serious unlawful injuries to public streets. *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475; *Neshkoro v. Nest*, 85 Wis. 126. No good reason is perceived why the equity powers of the court may not also be invoked to compel a restoration of a street unlawfully obstructed or encroached upon. In fact, such actions have been approved by this court in cases of obstructions unlawfully placed in streets by railway companies in building their tracks. *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534. The principle on which these cases rest applies to an obstruction or an encroachment maintained by a lot-owner. In both cases there is an invasion of the public right and a duty resting on the defendant to remove the unlawful structure. We think the action is properly brought.

By the Court.— Order reversed, and action remanded with directions to overrule the demurrer.

THE NORTH HUDSON MUTUAL BUILDING & LOAN ASSOCIATION, Respondent, vs. CHILDS and others, Appellants.

October 17 — November 7, 1893.

(1) *Notice of appeal.* (2) *Debtor and creditor: Fraudulent conveyances: Injunction.* (3) *Action at law or in equity? Breaches of trust and fraud by officers of corporation.* (4) *Amendment of complaint: Improper joinder of causes and parties: Demurrer.*

1. Under sec. 3049, R. S., a notice of appeal not directed to or served "on the clerk of the court in which the . . . order appealed from is entered," is a mere nullity.

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2. A mere creditor at large is not entitled to have conveyances of the debtor's property set aside as fraudulent; nor can the alleged fraudulent grantees be made parties in his action against the debtor (even though such action is an equitable one) merely for the purpose of restraining them from disposing of said property.
3. The complaint in this case, showing that defendants as officers of the plaintiff corporation had been guilty of breaches of trust and fraud in dealing with the property of the corporation, is *held* to state a good cause of action for equitable relief. *North Hudson M. B. & L. Asso. v. Childs*, 82 Wis. 460, adhered to.
4. New matter added to a complaint by amendment does not make an improper joinder of causes of action where the matter so added does not state a cause of action.
5. The original defendants cannot by demurrer to an amended complaint object that there is an excess of parties defendant because of the joinder of new defendants as to whom no cause of action is shown to exist.

APPEAL from the Circuit Court for *Eau Claire* County.

This case was before the court on appeal from a final judgment against the original defendants in the action, *James Childs* and *C. Y. Denniston*, 82 Wis. 460, where the case is stated. After the reversal of the judgment the circuit court ordered a reference of all the issues to a referee, to hear, try, and determine the same. Subsequently plaintiff, upon a petition alleging in substance that the defendant *Denniston* had, prior to the rendition of the judgment so reversed, conveyed to his son, *John C. Denniston*, by sundry deeds, divers lots and lands owned by him, without consideration and with the intent to hinder, delay, and defraud the plaintiff and to prevent it from levying upon and selling it and collecting its claim against him, and had transferred to him a considerable personal estate with like intent and for like purpose; and that the defendant *Childs*, for like purpose and with the same intent, without any consideration, prior to the rendition of said judgment, had conveyed a considerable part of his real estate to his daughters, Anna Childs and Cordelia Johnson, who had conveyed

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a part of the same to their mother, *Elizabeth Childs*, and other portions to his son-in-law, *William J. Johnson*, obtained on said petition an order at chambers for leave to amend the complaint by bringing in as parties defendants said *John C. Denniston*, *Elizabeth Childs*, and *William J. Johnson*, and inserting in said complaint suitable allegations in respect to said transfers; which being done, the plaintiff prayed as relief against such defendants that each of said conveyances be declared fraudulent and void as to any judgment that might be obtained in the action, and that a receiver might be appointed to take charge of such premises. This order was, on motion to set the same aside, affirmed by the court. The place of trial of the action was afterwards changed to Eau Claire county. The defendants demurred jointly and separately to the amended complaint for misjoinder of causes of action, for improper joinder of defendants, and for that it did not state facts sufficient to constitute a cause of action. The circuit court for Eau Claire county overruled the demurrers, and the defendants appealed from the order made thereon, and also from the order of the circuit court for St. Croix county granting leave to amend the complaint and bring in the additional defendants. Both appeals are embraced in one notice, and it was directed to and served only on the clerk of the circuit court for Eau Claire county.

For the appellants there was a brief signed by *H. L. Humphrey* and *Baker & Helms*, attorneys for *C. Y. Denniston* and *John C. Denniston*, and *Ray S. Reid*, attorney for *James H. Childs*, *Elizabeth Childs*, and *W. J. Johnson;* and the cause was argued orally by *Ray S. Reid.*

For the respondent there was a brief by *Bashford & Disney*, and oral argument by *J. W. Bashford* and *R. M. Bashford.* To the point that plaintiff was entitled to an injunction under secs. 2774–2776, R. S., they cited *Joseph v. McGill*, 52 Iowa, 127; *Delacey v. Hurst*, 83 Ga. 223;

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Miller v. Hughes, 33 id. 530; *Straton v. Hernon*, 154 Mass. 310; *Dorothy v. Halloday*, 32 N. E. Rep. (Ind.), 317; *Combs v. Watson*, 32 Ohio St. 228; *Way v. Way*, 67 Wis. 662; *Damon v. Damon*, 28 id. 510; *Gibson v. Gibson*, 46 id. 449; *Douglas Co. v. Walbridge*, 38 id. 179; *Dean v. Smith*, 23 id. 483.

PINNEY, J. 1. The notice of appeal from the order of the circuit court for St. Croix county allowing the complaint to be amended and new defendants to be brought in, was not directed to or served "on the clerk of the court in which the . . . order appealed from is entered," and is, as to such order, a mere nullity and wholly inoperative. R. S. sec. 3049; *Haas v. Weinhagen*, 30 Wis. 326; *Yates v. Shepardson*, 37 Wis. 315; *Eureka S. H. Co. v. Sloteman*, 67 Wis. 118, 124.

2. The plaintiff, upon its own showing, is merely a creditor at large of the defendants *James Childs* and *C. Y. Denniston*. As such, and until it obtains judgment, it is in no position to assail or impeach in equity the transfers and conveyances mentioned in the amended complaint. This is elementary. The only relief prayed as against the new defendants, *John C. Denniston*, *Elizabeth Childs* and *William J. Johnson*, is in respect to these alleged transfers and conveyances and the property described in them. It is manifest that as to these defendants the demurrers are well taken and should have been sustained. The amended complaint wholly fails to state facts sufficient to constitute a cause of action as to either of them. The possibility that the plaintiff may get judgment on its claim will not suffice. Courts of equity are not tribunals for the establishment or collection of ordinary demands; and until judgment recovered, at least, the creditor has no right to come into a court of equity to interfere with or control the money, property, or estate of the defendant. *Gilbert v. Stockman*, 81 Wis.

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602; *Montague v. Horton*, 12 Wis. 599, 606; *Meissner v. Meissner*, 68 Wis. 342. Where, as in this case, the alleged fraudulent transfer has been made, the court is not authorized, in an action by a creditor at large against the debtor and his fraudulent grantee, to restrain the latter from disposing of the property. *Reubens v. Joel*, 13 N. Y. 488; *Rinchey v. Stryker*, 28 N. Y. 50.

It is contended that the joinder of the new defendants, the alleged fraudulent grantees of the original defendants, ought to be maintained, to the end that the injunction granted when the complaint was amended, restraining all the defendants from selling or disposing of or in any way incumbering any of the lands so fraudulently conveyed, may be retained, under sec. 2774, R. S.;[1] and some cases were cited in support of this claim. The injunction contemplated by this section is only by way of provisional remedy, and it can be granted only "where it shall appear by the complaint that the plaintiff is entitled to the relief demanded." One cannot be made a party against whom no cause of action is shown to exist, simply for the purpose of restraining his conduct by injunction; and as to property already fraudulently conveyed, as alleged in this case, no injunction can go against the grantee where the plaintiff

[1] Sec. 2774, R. S., is as follows: "Where it shall appear by the complaint that the plaintiff is entitled to the judgment demanded, and such judgment or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when during the pendency of an action it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." — REP.

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is merely a creditor at large of the grantor until he has established his demand by judgment, although a temporary injunction may go upon proper allegations to prevent the alleged debtor from making a fraudulent removal or disposition of his property. In the case of *Reubens v. Joel*, 13 N. Y. 488, the statute relied on was construed in New York, from whence it was borrowed, and that case is decisive against the plaintiff's contention, and that construction, by a familiar principle, is held to have been adopted with the statute itself. The case of *Montague v. Horton*, 12 Wis. 606, is substantially to the same effect. The law on this subject is well settled in this state, and we see no reason for changing the rule. The cases of *Damon v. Damon*, 28 Wis. 510; *Gibson v. Gibson*, 46 Wis. 449; and *Way v. Way*, 67 Wis. 662,— where, in actions for divorce, conveyances have been set aside as in fraud of the marital rights of the wife,— are clearly distinguishable from the present, in that in those cases the fraud was one against the rights of the wife in her admitted relation as such. The fact that we have held that the action is an equitable one for the recovery of an equitable demand will not serve to take the case out of the usual rule. There can be no reason for adopting in this respect one rule for the collection of legal demands, and another in the case of equitable ones. *Geery v. Geery*, 63 N. Y. 252; *Bassett v. Warner*, 23 Wis. 688, 689.

Upon the former appeal we held the complaint must be regarded as setting out an equitable cause of action, and that it must be proceeded with accordingly. It is contended by the appellants that the complaint states only legal causes of action, and not an equitable cause of action, with several specifications of breach of duty. The defendants *Childs* and *Denniston*, in their several offices, were in a general sense trustees for the plaintiff, and the gravamen of the charge is that they have been guilty of breaches of

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trust, and, if the allegations of the complaint are true, their conduct has been fraudulent in fact as well as wrongful. Courts of equity have always exercised original jurisdiction in matters of fraud and trust, and although cases may occur so simple in their character that an adequate remedy may be had at law, yet the jurisdiction in equity has been maintained, in cases such as this, as being more efficient and better adapted to the ends of justice than an action at law, particularly where it is necessary to take and state an account or the matters presented are complex and involved. The allegations of the complaint as to *Childs* and *Denniston* are sufficient to show a case within the jurisdiction of a court of equity against offending trustees or, more strictly speaking, mandataries of the corporation. *Charitable Corp. v. Sutton*, 2 Atk. 400; *Spering's Appeal*, 71 Pa. St. 23; *Hodges v. New England Screw Co.* 1 R. I. 312, 3 R. I. 9; *Citizens' Loan Asso. v. Lyon*, 29 N. J. Eq. 110. We adhere, therefore, to the views expressed on the former appeal, and hold that the complaint states a good cause of action for equitable relief against the original defendants.

3. Inasmuch as the matter added to the complaint by way of amendment does not state a cause of action, the objection of multifariousness, or that different causes of action have been improperly joined, therefore fails. *Lee v. Simpson*, 29 Wis. 333, and cases cited. The defendants *James Childs* and *C. Y. Denniston* cannot by their demurrer object to the joinder of the new defendants, as to whom no cause of action is shown to exist. While the new defendants might be heard to object to such joinder, the original defendants cannot be heard by demurrer to object that there is an excess of parties defendant. They are not prejudiced by it. *Bronson v. Markey*, 53 Wis. 100; *Murray v. McGarigle*, 69 Wis. 484, 490; *Nichols v. Drew*, 94 N. Y. 22, 26. It follows, therefore, that the demurrers as to the defendants *James Childs* and *C. Y. Denniston*

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were properly overruled, and that the order appealed from must be affirmed as to them and reversed as to *John C. Denniston*, *Elizabeth Childs*, and *William J. Johnson*, and the cause must be remanded with directions to sustain the demurrers as to them, and for further proceedings according to law.

By the Court.—It is so ordered.

WILMOT, Respondent, vs. SMITH, Appellant.

October 17 — November 7, 1893.

Service of summons on nonresident by delivery: When complete: Judgment by default: Recital of no answer, when conclusive.

1. Under sec. 2640, R. S., when the plaintiff avails himself of the option given by an order for service by publication to deliver a copy of the summons and complaint to the defendant personally without the state, such delivery has "the same effect as a completed publication and mailing," and the defendant has but twenty days thereafter in which to plead.
2. A recital in a judgment that "no answer or demurrer has been served or filed herein," is conclusive on appeal, where the record does not show what proofs were made to the court when the judgment was applied for and ordered.

APPEAL from the Circuit Court for *Walworth* County.

This action was brought to quiet title to land, and for an injunction to restrain threatened trespass by defendant on such land. Defendant is not a resident of this state, and personal service of the summons upon him could not be obtained. Plaintiff obtained from the circuit court an order that service be made by publication of the summons, pursuant to sec. 2640, R. S. The procedure prescribed by the statute was complied with. Instead of actual publication of the summons, and the deposit of a copy thereof and of the complaint in

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the post office, plaintiff availed himself of the option given by the statute and in the order of publication, and caused such copies to be delivered personally to defendant out of the state. More than twenty days after such copies were so delivered, and less than sixty-two days thereafter, judgment by default was rendered for plaintiff for the relief demanded in the complaint. Defendant appeals from the judgment.

For the appellant there were briefs by *Samuel S. Page* and *D. S. Tullar*, and oral argument by *Mr. Tullar*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

LYON, C. J. Numerous purely technical points of practice were argued by counsel for defendant. They were not important, and require no further mention. But two questions require consideration.

1. Was defendant in default for failing to answer or demur to the complaint within twenty days after copies of the summons and complaint were delivered to him out of the state? The circuit court held that he was. His counsel claims that he was not, but was entitled to the full period of six weeks and twenty days additional in which to answer. The statute (sec. 2640) provides that such delivery "shall have the same effect as a completed publication and mailing." The word "completed" first appears in this statute in the Revision of 1878. It has been said that, under the statute as it stood before the revision, it was generally understood by the profession that in such cases the service was not complete until the expiration of six weeks from and after such delivery, and hence the nonresident defendant to whom delivery was made was given such six weeks and twenty days thereafter in which to serve his answer. It is further said, probably correctly, that such is the judicial construction of a statute in New York like

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our statute as it was before the revision. It may not be quite certain that any such general understanding prevailed as to the meaning of our former statute, but, if it did and if that was a correct construction of the statute, it is very clear it is not of the present statute. The term therein, "a *completed* publication and mailing," can have but one signification, which is that, when copies of the summons and complaint are thus delivered to the defendant without the state, the case is in the position it would have been at the termination of six weeks' publication of the summons, had such publication been made; that is, when such delivery is made, the service is completed, and the twenty days' term of the statute commences to run just as it does at the termination of six weeks' publication when no such delivery has been made.

2. In the record returned to this court on the appeal, there is an affidavit of one of the attorneys for the defendant to the effect that at a time specified therein, which was more than twenty days, and less than sixty-two days, after the delivery to defendant of copies of the summons and complaint, the affiant duly served an answer in the action on the attorney for plaintiff by delivering and leaving with him a copy of such answer. Probably, had plaintiff's attorney accepted such answer without objection and retained the same, it would have been a waiver of the default. It is asserted by counsel for plaintiff, and scarcely denied, that he refused to accept such answer, and returned the same within reasonable time. The record, however, does not show the fact. But it is recited in the judgment that "no answer or demurrer has been served or filed herein." There is no bill of exceptions, and the record does not show what proofs were made to the court when the judgment was applied for and ordered. The recital in the judgment is an adjudication that the defendant was in default, and we presume that it rests upon sufficient proofs. We con-

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clude that defendant was in default when judgment was ordered and entered, and hence the judgment is not irregular.

By the Court.—The judgment of the circuit court is affirmed.

POSTEL and another, Respondents, vs. WEINHAGEN and others, Appellants.

October 17—November 7, 1893.

Change of venue: Convenience of witnesses: Practice: Discretion.

1. Upon an application for a change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby, no procedure being prescribed by statute or rule, it is sufficient if the judge or court is satisfied by proof of some sort that a good cause for the change exists.
2. Where a change has been granted on that ground, this court will not reverse the order unless there has been a clear abuse of discretion.

APPEAL from the Circuit Court for *Milwaukee* County.

The facts are sufficiently stated in the opinion.

For the appellants there was a brief by *C. A. Koeffler, Jr.*, attorney, and *James G. Flanders*, of counsel, and oral argument by *Mr. Koeffler*. They cited *Satterlee v. Groot*, 6 Cow. 33; *Onondaga Bank v. Shepherd*, 19 Wend. 10; *Constantine v. Dunham*, 9 id. 431; *Price v. Ft. Edward W. W. Co.* 16 How. Pr. 51; *Am. Exch. Bank v. Hill*, 22 id. 29; *Barnard v. Wheeler*, 3 id. 71; *Olivier v. Cunningham*, 51 Minn. 232; *Carpenter v. Continental Ins. Co.* 31 Hun, 78; *Brittan v. Peabody*, 4 Hill, 62.

For the respondents there was a brief by *John D. Wilson*, attorney, and *C. M. Scanlan*, of counsel, and oral argument by *Mr. Scanlan*.

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ORTON, J. The order appealed from is for changing the place of trial of this action from Milwaukee county to Grant county, for the reason that "the convenience of witnesses and the ends of justice will be promoted thereby." The action was commenced in Grant county, and the place of trial changed to Milwaukee county, by reason of the last-named county being the place of the defendants' residence and of the business of the defendant corporation; and now the place of trial is changed back to Grant county, for the convenience of witnesses and the ends of justice. The statute (sec. 2622, R. S.) under which this change of the place of trial was last made prescribes no procedure by affidavit or petition for such removal, and there is no rule of court upon the subject. It is sufficient if the judge or court is satisfied by proof of some sort that a good cause for the change exists. *Cartright v. Belmont*, 58 Wis. 370. It rests in the sound discretion of the court to grant or refuse such removal, and this court should not reverse the order, in either case, unless there has been a clear abuse of such discretion. *Lego v. Shaw*, 38 Wis. 401; *Ross v. Hanchett*, 52 Wis. 491; *Lynes v. Eldred*, 47 Wis. 426; *Meiners v. Loeb*, 64 Wis. 343.

It is a matter of some importance, in such case, where the subject matter of the suit is located, if it is local anywhere. It would seem to be most convenient for the witnesses to have the case tried in or near such locality. The subject matter of the suit is a toll bridge across the Wisconsin river, with one end in Grant county. The plaintiffs were the owners of the bridge, and the defendants contracted to repair it and, while engaged in the work, to keep it open for travel and safe for such purpose, and to indemnify the plaintiffs against any liability on account of any failure to perform such contract. While they were so engaged in repairing the bridge, one Mrs. Thresher was injured while crossing the bridge, by reason of the failure

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of the defendants to keep up the railings on the same and to keep the bridge safe for travel. The said Mrs. Thresher obtained a large judgment in said county of Grant against the plaintiffs for her personal injuries occasioned by such neglect of the defendants, which the plaintiffs have been compelled to pay, as well as a large amount of damages to her husband for the loss of her services occasioned by her injuries. These damages constitute the demand in this case. This is substantially the subject matter of the suit. The material witnesses must be able to testify to the condition of this bridge during the repairs. It would seem reasonable that the witnesses who knew and could testify to the most of the matter would be resident of Grant county or vicinity.

Besides the evidence afforded by the subject matter, the affidavits of the two plaintiffs and their attorney show that about thirty witnesses, whose testimony will be material, will be required to prove the cause of action, and that they all reside in Grant county or in the vicinity, and to whom it would be most convenient to have the action tried in that county. On the other hand, affidavits were presented on behalf of the defendants tending to show that they will require the attendance of an equal number of witnesses to testify in defense of the action, whose convenience would be best consulted by having the trial in Milwaukee county.

These were the facts upon which the court acted and granted the order for the change of the place of trial to Grant county; and they were sufficient, not only to show that the court did not abuse its discretion, but decided wisely on the *merits* of the application. It is sufficient that the court acted on evidence and its decision was judicial and not arbitrary. It is not our province to review such a decision, based upon apparent grounds. *Couillard v. Johnson*, 24 Wis. 533. The New York cases cited by the learned

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counsel of the appellants to show that certain formalities are to be observed in presenting the facts to the court are not applicable. The statute may be the same, but the rules in that state prescribe the forms of the application, and we have no rule in that respect. *Cartright v. Belmont*, 58 Wis. 370.

By the Court.— The order of the circuit court is affirmed.

VOLLMER, Appellant, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Garnishee, Respondent.

October 18 — November 7, 1893.

Garnishment: Railroads: Amount due to contractor: Contingent liability to laborers.

A railway company may withhold so much of the amount due to a contractor as it may become liable to pay to his laborers under sec. 1815, S. & B. Ann. Stats., and cannot be deprived of such right either by the contractor or by garnishment in a suit against him. As garnishee of the contractor it can be held liable for so much only as shall remain due to him after the determination of its contingent liability to his laborers.

APPEAL from the Circuit Court for *Milwaukee* County.

This action was commenced against the principal defendant, Wolf, August 23, 1892, and on the same day the garnishee papers were served on the defendant railway company. The complaint against Wolf is to the effect that he is indebted to the plaintiff in the sum of $735.93 upon an account for services rendered, board furnished, moneys paid, and for certain goods, wares, and merchandise sold and delivered, by the plaintiff to said Wolf, at his request, between June 15, 1892, and August 22, 1892, no part of which had been paid. On September 21, 1892, judgment was rendered

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against Wolf for the amount of plaintiff's claim and costs, amounting in all to $762.34.

On October 25, 1892, the defendant railway company, as garnishee, answered, to the effect that Wolf was employed by the company as contractor in and about the construction of a certain railroad track in the county of Milwaukee; that Wolf performed work and labor under his said contract to the amount of $1,210.01, and that the same is due and owing from the company to Wolf; that divers and sundry persons were employed by Wolf in and about the work mentioned, to whom Wolf at the time of the service of the garnishee summons was, and still is, indebted for such work and labor; that the following named parties so employed had served upon the company notices of liens for the value of such work and labor, pursuant to sec. 1815, R. S., to wit, ten persons, whose names and residences are given, to whom Wolf was so indebted in the aggregate sum of $817.80; that under the laws of this state the company is directly liable to the parties named for the amounts of their respective liens so served, and hence the company asks that the amounts of said several claims be deducted from the amount so due and owing from the company to Wolf, and that the persons named be interpleaded herein; that twelve other persons, whose names and residences are therein given, were employed by Wolf in and about said work, and to whom Wolf at the time of the service of the garnishee summons herein was, and still is, indebted for the several amounts set opposite their respective names, amounting in the aggregate to $113.48, and that said persons, respectively, are entitled to be paid out of any sums in the hands of said company due and owing to Wolf, notwithstanding they had not served or filed their liens pursuant to said sec. 1815; that the company submits the rights of the parties named to the court for its determination, and asks that they be interpleaded herein, and whether the amount due and owing

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to the said laborers from Wolf should be deducted from the amount due and owing to Wolf from the company; that at the time of the service of the garnishee summons herein the company did not hold, and does not now hold, the title or possession of any real estate or any interest in land of any description, or of any personal property, effects, or credits, or any instrument or paper relating to any such, belonging to the defendant Wolf or in which he is in any wise interested.

Upon such answer of the garnishee, the plaintiff moved for judgment against the company for $762.34, and interest from September 21, 1892. From an order denying said motion with costs the plaintiff appeals.

For the appellant there was a brief by *Kelly & Kelly*, and oral argument *John T. Kelly*. They contended that plaintiff was entitled to have his judgment against Wolf satisfied out of the funds in the hands of the railway company at the time of the service on it of the garnishee summons, no notices for liens having been served under sec. 1815, S. & B. Ann. Stats., prior to the service of such summons, notwithstanding the direct liability of the company to the men employed by Wolf. The garnishment operated as an assignment of the debt owing by the company to Wolf, and will take precedence of subcontractors' claims for liens, notice of which was given afterward. R. S. sec. 2768; *Dorestan v. Krieg*, 66 Wis. 604; *Hall v. Banks*, 79 id. 236; *Mallory v. La Crosse A. Co.* 80 id. 170, 176-7; 15 Am. & Eng. Ency. of Law, 95; Phillips, Mechanics' Liens, 367-369; *McCullom v. Richardson*, 2 Handy (Cin.), 274; *Copeland v. Manton*, 22 Ohio St. 398; *Sup't Public Schools v. Heath*, 15 N. J. Eq. 22; Brandt, Suretyship, 253; *Ingalls v. Dennett*, 6 Me. 79.

For the respondent there was a brief by *Winkler, Flanders, Smith Bottum & Vilas*, and oral argument by *F. C. Winkler*.

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CASSODAY, J. The statute declares, in effect, that as often as any contractor for the construction of any railroad or part thereof in process of construction shall be indebted to any laborer for thirty days' labor or less, either manual or team labor or both, including team and driver, performed in constructing such road, such laborer may, within thirty days after the claim or demand of such laborer shall have accrued, serve notice in writing thereof on the corporation as therein designated; "*and thereupon* such corporation *shall be directly liable to such laborer* for the amount so due him, provided he bring his action therefor within sixty days after the service of such notice." Sec. 1815, S. & B. Ann. Stats. (ch. 318, Laws of 1881). This statute was manifestly intended to make the company absolutely liable, at least to the aggregate amount of the contract price, to such laborers as should serve their notices and commence their actions, respectively, within the times mentioned and as therein designated. *Drake v. Harrison*, 69 Wis. 99, 2 Am. St. Rep. 717; *Sterling v. Ryan*, 72 Wis. 36, 7 Am. St. Rep. 818; *French v. Langdon*, 76 Wis. 29. Any payments made to such laborers so serving such notices necessarily operated as payments *pro tanto* to Wolf, and hence the company was directly interested in the payment of such laborers. The company, therefore, had the right to withhold so much of its indebtedness to Wolf as was necessary to pay such laborers so serving such notices; and the company cannot, without its consent, express or implied, be deprived of such right, either by the act of Wolf, or by garnishment in a suit against him. *Drake v. Harrison*, 69 Wis. 99. Wolf's right to recover the whole amount of such indebtedness, therefore, was not absolute, but depended upon contingencies. This court has repeatedly held, in effect, that a garnishee is not liable, as such, for property, moneys, credits, or effects in his possession or under his control, belonging to the principal defendant, unless the right of the principal

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defendant thereto is *absolute at the time* of the service of the garnishee process. Sec. 2768, R. S.; *Foster v. Singer*, 69 Wis. 392; *Edwards v. Roepke*, 74 Wis. 575. Where, as here, therefore, the amount of the indebtedness which the garnishee is ultimately liable to pay to the principal defendant depends upon contingencies, such garnishee can only be held liable for so much as shall remain due to such principal defendant upon the determination of such contingencies. *Ibid.* Here it is conceded that there is a considerable amount for which the company is so liable. The plaintiff, however, was unwilling to accept judgment for that amount, but appeals from an order refusing judgment for the whole amount. Of course, the plaintiff is entitled to judgment for so much as the company was indebted to Wolf upon the determination of such contingencies. The case is unlike those cited by counsel, under statutes which freed the owner from liability to subcontractors in case he had paid the principal contractor before receiving notice from the subcontractor.

By the Court.— The order of the circuit court is affirmed.

ROHDE, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 18 — November 7, 1893.

Railroads: Frightening horse at highway crossing: Failure to lower gates: Negligence: Pleading.

The complaint in this case is construed as alleging, in substance, that the crossing of defendant's railway tracks and a certain highway was a dangerous one; that defendant had for some time, to the knowledge of plaintiff, maintained guard gates at the place; that, relying on the fact that there were such gates and that they were always lowered on the approach of trains, plaintiff, because the

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gates were not lowered, approached the crossing, and was about to pass over it, when a train passed and caused his horse to run away and thus inflicted the injuries complained of. So construed, the complaint is *held* to charge actionable negligence on the part of defendant.

APPEAL from the Superior Court of *Milwaukee* County.

This is an appeal from an order overruling a general demurrer to the plaintiff's complaint. The complaint, after alleging the corporate character of defendant, and that it operated a railway in the city of Milwaukee, certain tracks of which cross a public highway called "Oakland Avenue," in said city, continues as follows: "That said crossing, as the defendant, its agents, servants, and employees well knew, was at and for some time prior to the times herein mentioned a dangerous crossing; that by reason thereof said defendant, its agents, servants, and employees, caused to be erected and maintained at said crossing, for some time prior to and at the times herein mentioned, guard gates for the purpose of warning persons of the approach of, and passing over of said crossing, of trains owned and operated by said defendant; that said defendant, its agents, servants, and employees, for some time previous to the times herein mentioned, lowered said guard gates upon the approach and crossing of the trains of the said defendant as aforesaid, for the purpose of warning all persons of the approach of said trains; that this plaintiff, well knowing said fact, and relying thereon, upon the 24th day of July, 1892, at about 5:50 o'clock in the afternoon of said day, while driving on said Oakland avenue with a one-horse, two-seated vehicle, in company with his wife, Alvina Rohde, and his three children, Paul Rohde, Walter Rohde, and Clara Rohde, without any fault, carelessness, or negligence on his part or on the part of his said wife and children or either of them, and with care and caution, did approach and attempt to pass over said crossing; that at or about the

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same time an engine and train of cars belonging to and in charge of said defendant, its agents, servants, and employees, was negligently and carelessly caused to approach and pass over the said crossing without warning or notice whatever to this plaintiff, and while the said guard gates were not lowered as aforesaid; that without any fault, carelessness, or negligence on the part of this plaintiff or of his said wife and children, said defendant, its agents, servants, and employees, at the time this plaintiff and his said wife and children so approached said crossing as aforesaid, negligently and carelessly failed to lower said guard gates upon the approach of said engine and cars; that by reason thereof the horse which this plaintiff was driving as aforesaid became frightened at the puffing and other noise made by said engine, became ungovernable, and ran away, overturning the said vehicle, throwing, with great violence, to the ground, this plaintiff and his said wife and children, causing great injury to the body and person of this plaintiff, and to the body and person of his said wife, and to the body and person of each of his said children, to the great damage of the plaintiff, as follows." The damages are set out in detail, and judgment demanded.

The cause was submitted for the appellant on the brief of *Winkler, Flanders, Smith, Bottum & Vilas*, and for the respondent on that of *W. J. Allen* and *E. H. Mosher*.

Counsel for the respondent cited *Evans v. L. S. & M. S. R. Co.* 88 Mich. 442; *Haywood v. N. Y. C. & H. R. R. Co.* 59 Hun, 617; *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502; *French v. T. B. R. R.* 116 Mass. 537; *Bonnel v. D., L. & W. R. Co.* 39 N. J. Law, 189; *Ernst v. H. R. R. Co.* 39 N. Y. 61; *Sweeny v. O. C. & N. R. Co.* 10 Allen, 368; *Railway Co. v. Schneider*, 45 Ohio St. 678; *Central T. Co. v. W., St. L. & P. R. Co.* Fed. Rep. 159; *State v. B. & M. R. Co.* 80 Me. 430; *Hooper v. B. & M. R. Co.* 81 id. 260.

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WINSLOW, J. In support of the demurrer, it is argued that the complaint does not show that the negligence mentioned, i. e. the failure to lower the gates, was the cause of the accident. There is certainly much force in the argument. The complaint is far from being a model. It does not set forth that direct, logical sequence of events by which it would appear that the accident was the result of the negligence charged, as clearly as could be desired. We think, however, that, by a fair construction of the complaint, its substance is as follows: That the crossing was a dangerous one; that the defendant had for some time, to the knowledge of plaintiff, maintained guard gates at the place; that, relying on the fact that there were such gates and that they were always lowered on the approach of trains, the plaintiff, because the gates were not lowered, approached the crossing, and was about to pass over it, when a train passed and caused his horse to run away and thus inflicting the injuries complained of. If this is the proper construction of the somewhat disjointed allegations of the complaint, it certainly charges actionable negligence on the part of the defendant. The open gate was an assurance to the public that there was no danger, and an invitation to cross in safety. *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. N. Y. C. & H. R. R. Co.* 112 N. Y. 234; *Evans v. L. S. & M. S. R. Co.* 88 Mich. 442. If plaintiff proves that he accepted the invitation, and thereby put himself in a position of imminent danger (where he would not have been had the gates been lowered), and was injured by defendant's negligent act, no contributory negligence appearing, he establishes a cause of action. We think the complaint should be construed as alleging these facts in substance.

By the Court.— Order of the superior court affirmed.

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NEEVES, Appellant, vs. Boos and another, Respondents, GREGORY, Appellant, and others.

October 18 — November 7, 1893.

Receivers: Order directing foreclosure of mortgage: Discretion: Regularity of appointment: Collateral impeachment.

1. Plaintiff had purchased land from defendant G. and given back a mortgage securing notes for a part of the purchase price. Defendant B. claimed to own said notes and mortgage, and had got possession thereof and pledged them to defendant C. Defendant G., the payee, also claimed them. Plaintiff, in his complaint, offered to perform all the conditions of the notes and mortgage, and asked for the appointment of a receiver thereof, with power to receive payments, and that defendants interplead for the determination of their rights. The complaint also alleged false representations as to the land by G., and asked damages therefor and that the notes and mortgage be canceled down accordingly. The receiver was appointed as prayed. Afterwards, plaintiff having failed to make payments as they became due, an order was made directing the receiver to foreclose the mortgage unless plaintiff should pay the amount due within twenty days. On appeal by plaintiff and defendant G., such order is *held* not an abuse of discretion.
2. The regularity of the appointment of the receiver could not be questioned on the appeal from the order directing him to foreclose the mortgage.

APPEAL from the Circuit Court for *Milwaukee* County.

It appears from the pleadings in this action that the plaintiff, *William B. Neeves*, on the 29th of September, 1890, purchased of the defendant *Gregory* a large number of lots in Hyde Park in the town of Wauwatosa, near the city of Milwaukee, for $30,000, and received a warranty deed of them, and for the unpaid portion of the purchase money he executed to the defendant *Gregory* his five promissory notes in the aggregate of $22,500, secured by a mortgage on the same premises and payable, with interest, at various periods. The first note was paid January 1, 1892, and a second one matured January 1, 1893, as well as the

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annual interest on $18,500 on the 1st day of October, 1892, which note and said interest remain unpaid.

The plaintiff, in his complaint, states that the defendant *Gregory* claims to be the owner of the notes and mortgage, and that the defendants *Imre Boos* and the *Commercial Bank of Milwaukee* also claim the same, and the said bank has possession of them, indorsed in blank by said *Gregory*, by one Luscomb as his agent; that *Gregory* has forbidden him to make payment of the same to any other person than himself, except so much as might be necessary to extinguish a debt of one Luscomb of about $7,000, for security of payment of which to one Levinson said notes had been hypothecated; that *Boos* and the *Commercial Bank* had knowledge that said notes belonged, subject as aforesaid, to said *Gregory;* that *Gregory* claims payment of the notes, and so also do *Boos* and the said bank, and the plaintiff claims that, on account of the conflicting claims of the parties, he fears they will be transferred by either *Boos* or the bank to some *bona fide* purchaser without notice of the claims of the respective parties.

The plaintiff claimed damages by reason of certain false representations made to him at the time of the sale by *Gregory*, to the effect that certain streets marked on the plat of said premises, and staked out, had been dedicated to public use as streets throughout their entire length and breadth as thus indicated; that six certain lots had been graded as and for a street, and dedicated by the said *Gregory* for that purpose, subject only to a right of way of a certain motor company for the purpose of operating its railway and maintaining its track or tracks, and this way over the lots furnished the only practical means of access to and egress from the premises so purchased by him of said *Gregory;* that in violation of such representations, and in fraud of the plaintiff's rights, he conveyed said lots to said motor company in fee, excepting no easement over the

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same to the plaintiff or the public, and the motor company refused to recognize any such easement, and excluded the plaintiff from passage over said lots, whereby he was obliged to purchase said lots from said motor company at an expense of $3,000, and was in all damaged by reason of the premises in the sum of $5,000, and he claimed an abatement or deduction from said notes and mortgage of that sum, and alleged that *Gregory* was not a resident of the state of Wisconsin, but it was not claimed that he was insolvent.

The plaintiff asked judgment for the appointment of a receiver of the notes and mortgage, with power to receive payments thereon according to the terms thereof, and with power generally to carry out and effectuate the terms of the mortgage on the part of the mortgagee named therein to be performed; that the defendants transfer to the receiver all their rights in and to the same, and that they interplead for the determination of their rights in the premises, and that the plaintiff be permitted to pay into court the amount then due for interest on said notes and mortgage; that the damages of the plaintiff by reason of the wrongful acts and representations of the defendant *Gregory* be assessed and determined and the notes and mortgage be canceled down in the amount of such damages when so ascertained, and for other and general relief. Plaintiff offered in his complaint to perform any and all the conditions of the notes and mortgage, and to bring into court the sum of $1,110, then due as interest, for the benefit of the person or persons entitled thereto.

The defendant *Boos* sets up a claim to the sole and exclusive ownership of the notes and mortgage; that they were made in the name of the defendant *Gregory* for the convenience of *Boos;* that *Gregory* had no interest in them, but took the same in his name, under an agreement made through one Luscomb to hold the same solely for the ben-

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efit of *Boos*, and that he, *Boos*, afterwards acquired possession of the notes, and pledged and hypothecated them to the defendant *Commercial Bank*. The bank set up its claim as a *bona fide* assignee of the notes and mortgage as security for a loan to *Boos* of $10,000, by assignment from the said *Gregory* as well as the said Luscomb. The defendant *Gregory*, answering, among other things admitted the claim of the plaintiff to have a rebate allowed him, by reason of the sale of the lots to the motor company and the representations in regard to other streets, in the amount of $3,000, but not admitting any fraud or misrepresentation on his part in making the sale, and set up at length the particulars of the controversy between himself and *Boos* in regard to the ownership of the notes and mortgage.

A receiver was appointed by the court, as prayed by the plaintiff; and, $3,500 having afterwards become due on the mortgage, upon proof that the receiver had called upon the plaintiff for payment of it, but he had failed to pay the same or any part of it, application was made, upon affidavits to that effect and the record in the action, for an order authorizing and directing suit to be brought by the receiver for the foreclosure of the mortgage mentioned in the pleadings, on the hearing of which motion affidavits of George A. Neeves and S. S. Barney were read, the latter being the counsel of the defendant *Gregory*, as well as affidavits of witnesses, to the effect that the mortgaged premises were worth over $50,000. The court made an order accordingly, unless within twenty days from its date the plaintiff should pay all sums due upon said notes and mortgage. Both the plaintiff and the defendant *Henry Edson Gregory* appealed from the order.

For the appellant *Neeves* there was a brief by *C. W. Briggs;* for the appellant *Gregory* there was a brief by *Barney & Kuechenmeister;* and the cause was argued orally by *Mr. Briggs*. They contended that the order directing

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the foreclosure of the mortgage should not have been granted, for the reason, among others, that all the questions in controversy would have to be litigated in a foreclosure action, and could be settled much sooner and at less expense in this action; also because of the great uncertainty as to whether there was anything equitably due upon the notes and mortgage, the uncertainty of the establishment by *Boos* of the claim of ownership, the concession by *Gregory* that a scaling down of $3,000 would be just and equitable, and the protest of *Gregory* against the making of the order, and because *Gregory* had not been served with process, nor had he appeared in the action, at the time the receiver was appointed.

For the respondents there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas;* also a brief by *Glenway Maxon* for the respondent *Commercial Bank;* and the cause was argued orally by *F. C. Winkler* and *Mr. Maxon.*

PINNEY, J. 1. The plaintiff has secured the appointment of a receiver, who, as such, is an officer of the court, exercising his functions for the common benefit of all the parties, and his custody and control is the custody and control of the court for their benefit and subject to its orders and directions. The order appealed from is plainly a discretionary one, and will not be reversed unless the court in making it has abused its discretion. We think, in view of the circumstances and the frame and purpose of the action, that the court was fully justified in making the order. It is evident that the action and complaint in it are not framed so that a judgment can be given foreclosing the mortgage, and the action is not, therefore, calculated to do entire justice to all the parties; for, after the expense and delay of this action, whatever its result may be, the owner will have been prevented from foreclosing his mortgage in the mean time by reason of the receivership, and in the end

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will be subjected to the delay and expense of another action for that purpose. The plaintiff, so far from paying into court the money admitted to be due on the mortgage for interest, has also failed to respond to the receiver's demand of payment of the $3,500, the principal sum of one of the notes, which became due January 1, 1893. The order appointing the receiver, obtained by the plaintiff, provides "that the receiver collect the sums due or that may fall due upon the said notes and mortgage from time to time, and account therefor;" and the order directing the receiver to foreclose the mortgage unless the plaintiff should pay the amount due on it within twenty days is certainly no hardship to the plaintiff, for he can assert in such action, by way of defense or counterclaim, all his rights in the premises, and the rights of the different claimants may also be adjudicated. It is said that *Gregory* does not want the mortgage foreclosed. In this respect the plaintiff entirely agrees with him, but the matter has been placed by the receivership under the control of the court for the benefit of all the parties in interest, and neither the plaintiff nor the defendant *Gregory* has the right to dictate in the premises. We do not think that in point of discretion the order appealed from is fairly subject to criticism.

2. It is said that the order appointing the receiver was made without notice to the defendant *Gregory*. The order would not on that account be void, but merely erroneous and subject to be set aside on application to the court; and if the court improperly denied the application an appeal would lie. *Gibson v. Martin*, 8 Paige, 481. The defendant *Gregory* appeared and answered before the order directing the receiver to sue was made, and was heard in opposition to it, but has taken no steps to vacate or avoid the order appointing the receiver. The regularity of the receiver's appointment cannot be collaterally questioned, but must be impeached, if at all, in a direct proceeding for that pur-

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pose. In a suit by the receiver in relation to matters connected with his trust, the order of appointment will be conclusive. High, Receivers, § 203; *Vermont & C. R. Co. v. V. C. R. Co.* 46 Vt. 792; *Attorney General v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272.

For these reasons we hold that the order of the circuit court must be affirmed, and the cause remanded for further proceedings according to law.

By the Court.—It is ordered accordingly.

NEEVES vs. GREGORY, Appellant, Boos, Respondent, and others.

NEEVES vs. GREGORY, Respondent, Boos, Appellant, and others.

October 18—November 7, 1893.

(1) *Examination of adverse party: Oral interrogatories.* (2) *Deposition of party on his own behalf: Oral cross-examination.*

1. That clause of sec. 4096, R. S., which provides that "the party examining shall, in all cases, be allowed to examine upon oral interrogatories," applies to every examination under that section, whether before or after issued joined, or within or without the state.
2. Where the deposition of a party as a witness in his own behalf is taken without the state on commission and written interrogatories, the adverse party cannot cross-examine him orally.

APPEALS from the Circuit Court for *Milwaukee* County.

The facts are stated in the opinion.

For *Gregory* there were briefs by *Barney & Kuechenmeister*, and the cause was argued orally by *C. W. Briggs*.

For *Boos* there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

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LYON, C. J. Plaintiff brought this action for relief in respect to a certain mortgage executed by him, the ownership of which is claimed by each defendant, *Boos* and *Gregory*, adversely to the other. The action is therefore, in one aspect of it, in the nature of interpleader, and as to each other the defendants are adverse parties. In the progress of the action two orders were made by the trial court,— one relating to the examination of *Gregory* at the instance of *Boos*, under sec. 4096, R. S.; and the other to a proceeding by *Gregory* to have his deposition as a witness in his own behalf taken on commission. *Gregory* is a nonresident of this state. In the first order the court sustained the right of *Boos* to examine *Gregory* under sec. 4096, on oral interrogatories, on a commission to be executed in another state, and *Gregory* appeals. In the other order the court denied the right of *Boos* to cross-examine *Gregory* on oral interrogatories, on the taking of his deposition as a witness in his own behalf, out of the state, on commission and written interrogatories, and *Boos* appeals.

1. Sec. 4096, R. S., provides that the examination of a party thereunder at the instance of an adverse party "may be taken without the state upon commission in the manner provided for taking other depositions." It provides further that "the party examining shall, in all cases, be allowed to examine upon oral interrogatories." The manifest purpose of the statute is to give the examining party every reasonable opportunity for a most thorough examination of his adversary, and this is accomplished the most effectually by an oral examination. We cannot doubt, therefore, that the clause of the statute last above quoted should apply to every examination under sec. 4096, whether before or after issue joined, or within or without the state. The respondent would construe the first clause of the section above quoted as though it read that the examination "may be taken without the state upon commission in the manner

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provided for taking other depositions *upon commission.*" We construe the statute as though it read: "In the manner provided for taking other depositions upon notice or commission." This construction gives the right of examination upon oral interrogatories. R. S. secs. 4110, 4112. The practice adopted by *Boos* was therefore correct, and the order in that behalf should not be disturbed. Hence, on *Gregory's* appeal, the order is affirmed.

2. A party may take the deposition of his witness out of the state in a proper case, either on notice and oral interrogatories, or on commission and written interrogatories, at his option. If he elects to take the same in the latter mode, we know of no statute or authorized rule of practice which will permit the adverse party to cross-examine the witness orally. And we think it quite immaterial that the witness whose deposition is to be taken is the party himself. The same procedure is prescribed in both cases. The circuit court so held. Hence, on the appeal of *Boos*, the order is affirmed.

By the Court.— Ordered accordingly.

GARNY, Appellant, vs. KATZ, Respondent.

October 18 — November 7, 1893.

New trial: Terms.

Where no reasons for granting a new trial are stated in the order, it should impose as terms the payment of the taxable costs of the former trial.

APPEAL from the Superior Court of *Milwaukee* County.

Action to recover the sum of $500, with interest, alleged to be due the plaintiff for services performed by him as a real estate broker in securing for defendant certain land.

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The appeal is from an order granting a new trial after a verdict for plaintiff.

For the appellant there was a brief by *Rose & Woolcock*, and oral argument by *C. G. Woolcock*.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

ORTON, J. The jury returned a verdict in favor of the plaintiff for $560.08. Afterwards, and at the same term of the court, the defendant moved for a new trial on the minutes of the court, and the motion was granted without any reasons stated therefor, and without terms. When no reasons are given for granting a new trial after a verdict, the presumption is that it was granted on the ground that the verdict was against the weight of evidence, and in such case the court should impose the terms of the payment of the taxable costs of the former trial. *Pound v. Roan*, 45 Wis. 129; *Smith v. Lander*, 48 Wis. 587; *Schraer v. Stefan*, 80 Wis. 653. The order appealed from is therefore erroneous. The order was no abuse of discretion, but a mere omission of the terms.

By the Court.—The order of the superior court is reversed, and the cause remanded with direction to grant a new trial in the case upon the terms of the payment of the taxable costs of the former trial.

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CARBERRY, Administrator, Appellant, vs. GERMAN INSURANCE COMPANY, Respondent.
HODGSON, Appellant, vs. SAME, Respondent.

October 20 — November 7, 1893.

(1) *Insurance against fire: Loss payable to mortgagee: Who may maintain action?* (2) *Death of party: Revival of action: Laches: Discretion.*

1. The owner of mortgaged premises was, by a policy, insured against loss or damage by fire to an amount greater than the mortgage debt, "loss, if any, payable to" the mortgagee; and the insurer thereby agreed to make good unto the said assured, his executors, etc., all such loss or damage, not exceeding said amount. *Held*, that the policy was given primarily to insure the owner, and only so much was payable to the mortgagee as her interest might be; that she was not a trustee of an express trust within the meaning of sec. 2607, R. S.; and that in case of loss she could not alone maintain an action on the policy.
2. After an action upon the policy, brought by the assured and the mortgagee, had been pending for nine years, the assured died. His administrator was not appointed until two years after his death, and no application to revive the action was made until a year later, after there had been a trial thereof and a judgment dismissing the complaint. *Held*, that the denial of such application was not an abuse of discretion.

APPEALS from the Circuit Court for *Milwaukee* County.

On December 6, 1877, one Andrew Carberry, since deceased, owned a dwelling house in Pewaukee. On that day he procured from the defendant company a policy of insurance on the same, whereby, in consideration of a sum therein named, the defendant insured him against loss or damage by fire to the amount of $1,000, "loss, if any, payable to *Esther E. Hodgson*, mortgagee." Said company thereby agreed to make good unto the said assured, *his* executors, administrators, and assigns, all such immediate loss or damage, not exceeding the sum named, as should

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happen by fire between December 6, 1877, and December 6, 1878.

On August 21, 1878, said property so insured was totally destroyed by fire. On April 27, 1879, the assured's last proofs of loss were furnished to the defendant. On August 14, 1879, an action was commenced by the said Andrew Carberry and *Esther E. Hodgson* against this defendant in the circuit court for Waukesha county to recover such insurance. On October 10, 1879, the defendant demurred to the complaint for insufficiency. On June 21, 1880, such demurrer was overruled. The order overruling the same was reversed, March 24, 1881. See 51 Wis. 605. In February, 1882, the said Andrew Carberry and *Esther E. Hodgson* served an amended complaint in said action. On March 18, 1882, the defendant answered the said amended complaint upon the merits. On May 22, 1882, a jury in said action was waived by stipulation. On August 11, 1882, by leave of the court, the said Andrew Carberry and *Esther E. Hodgson* amended their amended complaint therein. On September 5, 1882, the defendant answered said last-named amended complaint. On December 5, 1882, the venue in said action was changed to Milwaukee county. During the following six years several motions and proceedings therein were had and taken, unnecessary to be repeated here.

On December 26, 1888, the said Andrew Carberry died intestate. On February 17, 1891, the plaintiff *James A. Carberry* was appointed administrator of his estate, and thereupon qualified as such. On January 19, 1892, the cause was tried without being revived as to said deceased, and at the close of said trial the court ordered the amended complaint to be dismissed. The costs were thereupon taxed, and judgment was thereupon entered in favor of the defendant and against the said *Esther E. Hodgson*, dismissing said amended complaint, and for $38.36 costs and disburse-

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ments. In February, 1892, the said *James A. Carberry*, upon affidavits, procured an order to show cause why the said judgment should not be set aside and the complaint amended so as to revive the cause on the part of the said Andrew Carberry in the name of the said *James A. Carberry* as such administrator. The defendant opposed said application, and April 22, 1892, the same was denied by the court. Thereupon the said *James A. Carberry*, as such administrator, applied to the court for leave to file a supplemental complaint as such administrator, and to prosecute said claim. On April 27, 1892, the defendant opposed the same by affidavits, and on January 28, 1893, the court made an order denying the application to set aside said judgment and allow said supplemental complaint to be filed and the claim to be prosecuted by the said *James A. Carberry*.

On January 20, 1893, the said *Esther E. Hodgson* appealed from said judgment so entered January 26, 1892; and the said *James A. Carberry* appealed from said order of January 28, 1893.

For the appellants there were briefs by *W. J. Turner* and *P. H. Carney*, and oral argument by *Mr. Turner*. They contended, *inter alia*, that the policy is, in effect, a promise by the insurance company for the benefit of a third person, *Mrs. Hodgson*. It is settled that such third person may maintain the action. *Putney v. Farnham*, 27 Wis. 187; *Bassett v. Hughes*, 43 id. 319; *McDowell v. Laev*, 35 id. 171; *Cotterill v. Stevens*, 10 id. 422; *Cook v. Barrett*, 15 id. 596; *Kimball v. Noyes*, 17 id. 695; *Kollock v. Parcher*, 52 id. 399. Assuming that *Mrs. Hodgson* has personally only a partial interest in the recovery, still by the terms of the policy she is made payee in case of loss, and is the trustee of Carberry for the sum remaining after her debt is satisfied. Payment to her and a release by her will completely discharge the defendant from liability

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under the policy. She may, therefore, maintain the action alone. R. S. sec. 2607; *Kimball v. Spice*, 12 Wis. 668; *Archibald v. Mut. L. Ins. Co.* 38 id. 542; *Considerant v. Brisbane*, 22 N. Y. 389; *Wetmore v. Hegeman*, 88 id. 69; *Greene v. Niagara Ins. Co.* 13 Hun, 128. The court being of the opinion that Andrew Carberry was a necessary party plaintiff, and it appearing that he was dead, it became the duty of the court to stay the proceedings and order the administrator brought in. R. S. sec. 2610; *Shove v. Shove*, 69 Wis. 425; *Jones v. Graham*, 80 id. 6.

F. W. v. Cotzhausen, for the respondent.

CASSODAY, J. At the time the policy was procured *Mrs. Hodgson* held a mortgage on the premises, given September 6, 1876, for $600. That mortgage was considerably less than the amount of the insurance. The property insured being real estate, there can be no question that the mortgage was merely a lien, and that the mortgagor, Andrew Carberry, was the absolute owner of the premises and had an insurable interest therein to the extent of their value, notwithstanding the mortgage. *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510. It is, moreover, well settled that *Mrs. Hodgson*, as mortgagee, was absolutely bound by any and all the stipulations in the policy. *Gillett v. L. & L. & G. Ins. Co.* 73 Wis. 203; *Blake Opera House Co. v. Home Ins. Co.* 73 Wis. 670; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 156; *Continental Ins. Co. v. Hulman*, 92 Ill. 145. It follows that whatever may have been said or done by Andrew Carberry as such owner which might operate to defeat the policy would be equally available as a defense against any claim made against the company by *Mrs. Hodgson. Ibid.* This being so, it is very manifest that Andrew Carberry was a necessary party to the action, and that he and *Mrs. Hodgson* were properly joined as plaintiffs when the action was originally commenced. *Hammel v. Queen Ins. Co.* 50

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Wis. 244. The action so commenced was pending for more than nine years before the death of Andrew Carberry. He had been dead for more than three years before the cause came on for trial, and it was then tried without ever having been revived as to his representatives and with *Mrs. Hodgson* as sole plaintiff. Prior to such trial her mortgage had been foreclosed, and she had thereby realized a considerable portion of her claim; and of course the balance of it belonged to the estate of the deceased. It is contended that the wording of the policy, as mentioned in the foregoing statement, would have justified *Mrs. Hodgson*, as "a trustee of an express trust," to commence and prosecute the action in her own name, without joining Andrew Carberry; and hence that she had the legal right to prosecute the same after his death without being revived in the name of his representative. But we do not think the wording of the policy brings the case within the section of the statute relied upon,—sec. 2607, R. S. The agreement in the policy is to make good unto Andrew Carberry, his executors, administrators, and assigns, all such loss or damage, not exceeding the sum named. The words, "loss, if any, payable to *Esther E. Hodgson*, mortgagee," must be construed with reference to the general purpose and import of the policy; and, so construed, it is very obvious that the policy was given primarily to insure Andrew Carberry, and only so much was made payable to *Mrs. Hodgson* as her interest might be. Indeed, the original complaint and the several amended complaints are all on that theory. Since her claim was subject to any and all defenses available against Andrew Carberry, and since the defendant could not make such defenses without the presence of Andrew Carberry, or his representative, as a party, it was obvious that the trial court was right in holding that *Mrs. Hodgson* could not maintain the action as sole plaintiff. *Thatch v. Metropole Ins. Co.* 11 Fed. Rep. 29; *Hartford F. Ins. Co. v. Daven-*

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port, 37 Mich. 609; *Shove v. Shove*, 69 Wis. 425. The judgment of the circuit court on her appeal is affirmed.

The question recurs whether the court improperly refused to allow the action to be revived on the application of the administrator. As indicated in the foregoing statement, he was not appointed until more than two years after the death of Andrew Carberry, and the application was not made until more than three years after his death, nor until after the trial and judgment against *Mrs. Hodgson*. The statute provides, in effect, that in case of the death of a party, if the cause of action survives or continues, the court, on motion, at any time *within one year* thereafter, or *afterwards on a supplemental* complaint, *may* allow the action to be continued by or against his representatives or successor in interest. Sec. 2803, R. S. The question presented has recently received the careful consideration of this court. *Cavanaugh v. Scott*, 84 Wis. 93. It was there in effect held that the court is at liberty, in the exercise of a sound discretion, to grant or refuse such application according to the peculiar circumstances of each particular case; that an unexplained and unexcused neglect to proceed for an unreasonable period, whereby the other party has or may have lost his means of defense, would justify such refusal; that such laches may consist in long delay and gross neglect to proceed in the action, before as well as after the death of the party; but that the mere lapse of time which the court can see will not operate prejudicially to the opposite party, and not amounting to a statutory bar, will not afford ground for the denial of such application. The reasons for so holding and the authorities in support of the same are sufficiently given in the opinion of Mr. Justice PINNEY in the case cited. The same principle as to laches has frequently been affirmed by our highest federal court. *Bryan v. Kales*, 134 U. S. 126; *Galliher v. Cadwell*, 145 U. S. 368; *Johnston v. Standard M. Co.*

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148 U. S. 360. From a careful examination of the record we are constrained to hold that there was no abuse of discretion in refusing the application of the administrator. The order of the circuit court on *James A. Carberry's* appeal is affirmed.

By the Court.— Ordered accordingly.

THE CHARLES BAUMBACH COMPANY, Respondent, vs. SINGER, Garnishee, Appellant.

October 20 — November 7, 1893.

Voluntary assignment: Failure to approve bond of assignee: Judgment: Retroactive statute.

Prior to the enactment of ch. 276, Laws of 1893, if the court commissioner taking the bond of an assignee for the benefit of creditors failed to indorse on it his approval thereof, the assignment was void. And where an assignment had been adjudged void for that reason, such judgment was not affected by the subsequent passage of said act, although it provides that "all bonds heretofore taken and filed . . . by said court commissioner are hereby declared to be sufficiently approved and valid."

APPEAL from the Superior Court of *Milwaukee* County.

Garnishment. The facts are sufficiently stated in the opinion. The garnishee appeals from a judgment in favor of the plaintiff.

For the appellant there were briefs by *Fiebing & Killilea*, and oral argument by *H. J. Killilea*.

For the respondent there was a brief by *Sylvester & Scheiber*, and oral argument by *F. Scheiber*.

WINSLOW, J. The respondent is a judgment creditor of the firm of Schwartz & Co., and sued out garnishee process against *Singer*, who is the assignee of said firm under a

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voluntary assignment. It appeared, without dispute, that the court commissioner who took the bond of the assignee failed to indorse thereon his approval thereof. Upon this ground, the trial court held the assignment void and the garnishee liable. This exact question was decided in *Shakman v. Schlueter*, 77 Wis. 402, and upon the reasoning and authority of that case it is apparent that the judgment of the trial court was right.

After the judgment in this case, ch. 276, Laws of 1893, was passed, which, referring to such bonds, attempts to provide that "all bonds *heretofore* taken and filed . . . by said court commissioner are hereby declared to be sufficiently approved and valid." This act cannot affect the judgment in this case. "Legislative action cannot be made to retroact on past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made, for this would be the exercise of judicial power." Cooley, Const. Lim. (6th ed.), 112.

By the Court.— Judgment of the superior court affirmed.

MILLER and others, Respondents, vs. TRACY, Appellant.

October 20 — November 7, 1893.

(1) *Appeal: Review of findings.* (2) *Estates of decedents: Liability of administrator for services of attorney: Implied assumpsit.*

1. A finding of fact by the trial court will be regarded in all respects as a verity, as against a respondent who took no exception thereto.
2. Where an attorney has rendered services and made disbursements in defeating a claim against the estate of a decedent in the belief that he was employed for that purpose by the administrator, when in fact their minds never met as to such employment, the administrator, having taken the benefit of such services and disbursements, may be held personally liable for their value upon an implied assumpsit, especially where he has assets of the estate out of which to indemnify himself.

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APPEAL from the Superior Court of *Milwaukee* County.

This action was brought to recover the sum of $552.02 for services rendered and disbursements made in successfully defending against a claim of about $11,000 against the estate of the defendant's intestate, William Swale, deceased, and the defendant appeals from a judgment rendered against him for the entire demand.

Plaintiffs, the successors in interest of Finches, Lynde & Miller, who rendered the services and made the disbursements, claim that said firm had been employed by the defendant as administrator of Swale's estate to defend against the said claim filed against it, and the defendant denied this and claimed that they had been employed for that purpose by the First National Bank, a creditor of the same estate for about $1,000. The referee found, in substance, among other things, that the First National Bank of Milwaukee was a creditor of said estate to the amount of about $1,000, and that the firm of Finches, Lynde & Miller were the regular attorneys of the said bank; that the defendant called at the office of said firm and had a conversation with one of its members, which resulted in said firm assuming charge of the contest of the said claim for said estate; that the defendant did not, at the time of said conversation nor at any other time, consciously and intentionally retain said firm to act as his attorneys in relation thereto, but at the time he believed that said firm was assuming charge of said contest as the attorneys for said bank, and the member of said firm with whom he had the conversation believed that he was retaining said firm as his attorneys in the matter; that there was not at any time any meeting of the minds of the defendant and said firm, or any one of them, upon the question of such employment, and said firm, believing in good faith that they had been retained by the defendant as such administrator to contest said claim, proceeded with the contest, and, after trial in the superior court, succeeded

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in defeating it, saving to said estate for the beneficiaries thereof the sum of about $11,000 or $12,000; that said firm never had any knowledge or information that the defendant believed that they had been acting as the attorneys of the bank, or of the creditors of the estate, until after the services had been rendered and said claim defeated and they had sent their bill therefor to the defendant; that said firm was not retained by the First National Bank; that the defendant during all the time believed in good faith that said firm was acting as attorneys of the First National Bank, and not as his attorneys, and that said firm rendered the services and made the disbursements in the belief that they had been retained by the defendant, as such administrator; that the result of the contest was that the administrator of Swale's estate was enabled to and did pay in full all of the legitimate claims against said estate, and that he has still in his hands funds sufficient to pay the plaintiffs' claim.

The circuit court confirmed the report, and gave judgment accordingly. Exceptions were taken to the finding by the defendant, but none were taken on the part of the plaintiffs.

For the appellant there was a brief by *Sylvester & Scheiber*, and oral argument by *F. Scheiber*.

For the respondents there was a brief by *F. A. Geiger*, and oral argument by *E. S. Mack*.

PINNEY, J. 1. The finding of the referee as to the facts is as favorable to the defendant, we think, as he could reasonably have expected, and, so far as his exceptions are concerned, it is so fully sustained by the evidence that no particular discussion of facts is required, except to say that upon the question whether the plaintiffs' assignors were employed by the bank the testimony is somewhat conflicting; but the referee, who saw and heard the witnesses testify, found against the defendant on this point, and the circuit

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court confirmed the finding. We think that there is a decided preponderance of evidence in support of the finding. As to the plaintiffs, the finding must be regarded in all respects as a verity, they having failed to take any exceptions to it. To take advantage of an erroneous finding in order to sustain a judgment in favor of the respondent he must have excepted to such finding, and he cannot for that purpose take advantage of exceptions reserved by the appellant. R. S. secs. 2870, 2875, 3070; *Maxwell v. Hartmann*, 50 Wis. 660; *Witt v. Trustees*, 55 Wis. 376; *Jones v. Jones*, 64 Wis. 307; *Hoey v. Pierron*, 67 Wis. 267; *Cramer v. Hanaford*, 53 Wis. 85.

2. The legal title or ownership of the personal estate of the intestate, Swale, vested in the defendant as his administrator on his appointment and qualification, and he held this property as the trustee and representative of all persons interested therein, whether as creditors or distributees, for the purposes of proper and legal administration of it according to the priorities and rights of the parties in interest, and a valid title to the personal estate of the decedent could be acquired only through such administration. Schouler, Ex'rs, § 239; *Estate of Kirkendall*, 43 Wis. 179; *Murphy v. Hanrahan*, 50 Wis. 485, 490; *Melms v. Pfister*, 59 Wis. 192. The duty of collecting, protecting, and caring for the estate was devolved on the administrator by reason of his trust ownership. And it was his duty "to defend the estate against claims which he honestly, or upon reasonable grounds, believed to be unjust, and these expenses should be reimbursed, even though the suit be lost, and certainly if the estate benefit by it." Schouler, Ex'rs, § 544; *Ammon's Appeal*, 31 Pa. St. 311. In employing counsel the executor incurs a personal liability, but his lien on the assets serves as his indemnity. Schouler, Ex'rs, §§ 256, 544. In *McLaughlin v. Winner*, 63 Wis. 128, it was held that "it is the general rule that upon all contracts

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made by an executor or administrator in the discharge of his duties as such he is liable personally, and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment recovered is to be satisfied out of his estate, and not out of the estate of the deceased." That is to say, that the creditor in such case cannot, save in exceptional circumstances, have his claim allowed directly to him against and paid out of the estate. But where the estate has derived a benefit from the services rendered to the administrator, and he is unable to pay or is insolvent, the creditor has been allowed to prove and proceed directly against the estate. But in a case where the administrator makes payment of a claim for proper and necessary counsel fees or other proper expenses of administration, he can charge the same in his account and have it allowed at a reasonable amount and paid out of the assets of the estate in his hands; and such claim will have priority over the general debts of the decedent. R. S. sec. 3852; Schouler, Ex'rs, § 544; 2 Woerner, Adm'n, § 362; *Golder v. Littlejohn*, 30 Wis. 344, 355; *Ammon's Appeal*, 31 Pa. St. 311; *McElhenny's Appeal*, 46 Pa. St. 347; *Forward v. Forward*, 6 Allen, 497. Where unjust claims are presented for allowance it is only through the medium of professional assistance that the administrator can properly and efficiently perform his duty of protecting the estate against them, and it is found in this case that the defendant believed the claim filed against the estate objectionable, and that it ought to be contested. The right of an administrator to be indemnified out of the assets for reasonable counsel fees stands upon the clearest possible equity, particularly where, as in this case, very important benefits resulted to the estate, and the rejection of the contested claim enabled him to pay all just debts and still have assets remaining in his hands more than sufficient to pay the plaintiffs' claim, which was found by the referee

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to be reasonable in amount. Equally strong and clear is the justice of the claim of these respondents to this reasonable compensation and their necessary disbursements, when there would have been comparatively little or no assets to pay creditors having just demands, or to divide with and among distributees of the decedent, but for the rendition and successful issue of such services.

The objection made to the recovery is that the defendant is not liable, because there was no express contract for the services, and no meeting of the minds of the parties in respect to their employment. The undisputed evidence shows that the defendant knew the plaintiffs were rendering the services which the attorneys employed by him as administrator felt bound to decline on account of their professional relations to the claimant, and that such services were highly beneficial, and resulted greatly to the benefit and advantage of all interested in the estate, whose interests it was the defendant's duty to protect, and he knew that the defense was made in his name as administrator, and he signed the objections or answer to the allowance of the claim; yet it is now insisted, in substance, that the administrator and parties thus interested may take to themselves and retain and enjoy the fruits of the services thus rendered and disbursements made, without making any compensation therefor. Had any laborer interposed to protect or preserve the goods and chattels of the estate in peril, and rescued them from destruction, can there be any question but that the administrator profiting thereby for the benefit of the estate would be liable for such services as on a *quantum meruit?* And would not an administrator be liable on the same ground for the value of the services of any one performing a lawful service in the management or settlement of the estate, although there was, as in this case, no express contract of employment? Upon what principle can it be held that the law of implied as-

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sumpsit is not to be applicable for the value of the services and disbursements sued for, rendered for the benefit of the estate vested in an administrator, as well as in the case of any other owner of property thus protected or benefited? In *Grier v. Huston*, 8 Serg. & R. 402, 406, it was held that assumpsit would lie as on an implied contract for money paid to an administrator by mistake, and that he would be so liable even if he had paid it to creditors, if he had assets still in his hands out of which to indemnify himself. And the case of *Corner v. Shew*, 3 Mees. & W. 350, is to the effect that an executor may be liable in his personal capacity on an implied assumpsit. *Ashby v. Ashby*, 7 Barn. & C. 444, 450, 451; *Brice v. Wilson*, 8 Adol. & E. 349.

But we think that the liability of the defendant in this case may be safely rested upon the ground that if services are rendered, as in this case, in the mistaken belief that there is a contract therefor, when the minds of the parties have never met, a recovery may be had *quantum meruit* for the benefit conferred by them, and upon the ground "that he who gains the labor and acquires the property of another must make reasonable compensation for the same" (*Van Deusen v. Blum*, 18 Pick. 229, 230, and cases cited); and that this rule is particularly applicable to the case of an administrator who has assets out of which to indemnify himself. The case of *Greene v. Bateman*, 2 Woodb. & M. 359, 362, rests very much on the same ground. So far as the services and disbursements benefited the estate in the hands of the defendant as administrator in the regular course of administration, the case stands, we think, upon a firm foundation. We do not perceive any reason why the administrator should not be held personally liable in this case. The fact that he has deliberately taken the benefit of the services and disbursements in question which enabled him to perform his duty as administrator, dispenses with

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any necessity of proving a previous request, and we are of the opinion that the defendant may be properly held liable for these services and disbursements, as well upon an implied assumpsit as if there had been an express contract, and we have not been referred to any authority to the contrary. The recovery in this case is, we think, correct.

By the Court.— The judgment of the superior court is affirmed.

NELLIS, Respondent, vs. CRAMER and others, Appellants.

October 20 — November 7, 1893.

Libel imputing unchastity: Damages: Reputation: Instructions.

1. In an action by a woman for a libel imputing to her a want of chastity, there was evidence that her general reputation for chastity was bad. *Held*, that unless some equivalent charge was given it was error to refuse to instruct the jury that if plaintiff, "at the time of the publication, was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity is bad cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity."
2. It was not equivalent to such instruction to charge that not only plaintiff's "reputation for chastity must you take into consideration, but also her general reputation," and "in determining the amount of the damages you will consider the nature of the charge made in this article; the injury which is produced upon the feelings of plaintiff. You must consider her character and reputation, her social standing among her friends and acquaintances and the public generally, and her mental suffering on account of this publication."

APPEAL from the Superior Court of *Milwaukee* County.

Action for libel. Defendants are proprietors of the Evening Wisconsin, a newspaper published by them in the city of Milwaukee. They published in that paper an abstract of a complaint which had theretofore been served,

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but not filed, in an action for divorce brought by one Mrs. Sullivan against her husband. The publication states that the husband is charged in the complaint with living openly with the plaintiff, and that the complaint charges the pair with other unseemly conduct. The publication is the alleged libel. The answer denies malice on the part of the defendants, and avers the truth of the matters stated in the publication.

On the trial, defendants introduced testimony tending to prove the truth of the publication; also that the general reputation of the plaintiff for chastity was bad. Numerous instructions to the jury on behalf of the defendants were proposed, one of which is as follows: "If you believe from the evidence that the plaintiff, at the time of the publication, was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity is bad cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity."

The jury returned a special verdict, in which they found that the charges against plaintiff in such publication were false, and that she was injured thereby in her character, reputation, and business in the sum of $1,200. A motion by defendants for a new trial was denied, and judgment for plaintiff entered for the damages assessed by the jury. Defendants appeal from the judgment.

For the appellants there was a brief by *Miller, Noyes & Miller*, and oral argument by *B. K. Miller, Jr.*, and *F. A. Geiger*.

For the respondent there was a brief by *Williams & May*, and oral argument by *A. B. May*.

Lyon, C. J. It is a fundamental rule in the law of libel and slander that the general reputation of the plaintiff is in issue, and if the defendant satisfies the jury that such repu-

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tation is bad it goes in mitigation of damages. This is on the principle that, in the nature of things, a person with a soiled reputation cannot be damaged by a libel or slander against his character to the extent that he would were his reputation good. This rule is fairly expressed in the proposed instruction quoted in the above statement of the case, and the same or its equivalent should have been given the jury. It is earnestly maintained by counsel for plaintiff that such equivalent was so given. All the court said to the jury on the subject was: "Not only *Mrs. Nellis'* reputation for chastity must you take into consideration, but also her general reputation," and, "in determining the amount of the damages, you will consider the nature of the charge made in this article; the injury which is produced upon the feelings of the plaintiff. You must consider her character and reputation, her social standing among her friends and acquaintances and the public generally, and her mental suffering on account of this publication."

We think the above remarks to the jury are not the equivalent of the instruction proposed, for they do not expressly, nor by clear implication, inform the jury that "a woman whose reputation for chastity is bad cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity." Defendants were entitled to have the jury so instructed, and the refusal to do so is error.

By the Court.—The judgment of the superior court is reversed, and the cause will be remanded for a new trial.

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MUELLER, Appellant, vs. MILWAUKEE STREET RAILWAY COMPANY, Respondent.

October 21 — November 7, 1893.

Street railways: Injury to carriage by sudden stopping of car: Proximate cause: Negligence: Violation of ordinance.

1. A street car, while crossing a street on which a funeral procession was moving, stopped suddenly in the middle of the street in front of the first carriage, thereby causing it to stop so suddenly that the pole of the second carriage, which was following close behind, broke into its back. *Held*, that the stopping of the street car was the proximate cause of the injury.
2. The fact that the street car was stopped in the middle of the street in violation of a penal ordinance, was sufficient proof of negligence on the part of the street railway company.

APPEAL from the Superior Court of *Milwaukee* County.

Action to recover damages for an injury to plaintiff's carriage, alleged to have been caused by the negligence of defendant and its servants. The facts are sufficiently stated in the opinion. The plaintiff appeals from a judgment of nonsuit.

John J. McAuliffe, for the appellant, as to what was the proximate cause of the injury, and to the point that plaintiff could recover although the stopping of defendant's car was not the *sole* cause, cited *Stetler v. C. & N. W. R. Co.* 46 Wis. 497; *Atkinson v. Goodrich Transp. Co.* 60 id. 141; *Papworth v. Milwaukee*, 64 id. 389; *Sherman v. Menominee R. L. Co.* 72 id. 122; *McClure v. Sparta*, 84 id. 269; *Selleck v. L. S. & M. S. R. Co.* 93 Mich. 375; *Campbell v. Stillwater*, 32 Minn. 308; Shearm. & Redf. Neg. sec. 39; Cooley, Torts, 76, 78, note; 2 Thomp. Neg. 1084; *Grimes v. L., N. A. & C. R. Co.* 3 Ind. App. 573, and cases there cited. If there was any question in the case as to what was the proximate cause of the injury, that question should have been

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submitted to the jury. *Stetler v. C. & N. W. R. Co.* 46 Wis. 497; *Durgin v. Munson*, 9 Allen, 396; *Kerrigan v. West End S. R. Co.* 158 Mass. 305.

For the respondent there was a brief by *Miller, Noyes & Miller*, and oral argument by *F. A. Geiger*. They contended that although it may have been a negligent act on the part of defendant to stop its car in the middle of the street, and although it may have been a violation of a statutory duty, yet the burden rests upon the plaintiff to show that the injury resulted *proximately* therefrom. 16 Am. & Eng. Ency. of Law, 422, and cases cited; *Hayes v. M. C. R. Co.* 111 U. S. 228. The stopping of the car was not the proximate cause of the injury, but was "a cause which some independent force took advantage of to accomplish something not the probable or natural effect thereof." Bishop, Non-Cont. Law, sec. 41; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 161; *Selleck v. L. S. & M. S. R. Co.* 58 Mich. 195; *Pittsburgh, C. & St. L. R. Co. v. Staley*, 41 Ohio St. 118; *Jackson v. N., C. & St. L. R. Co.* 13 Lea (Tenn.), 491; *Brown v. W., St. L. & P. R. Co.* 20 Mo. App. 222; *McCandless v. C. & N. W. R. Co.* 71 Wis. 41, 46.

ORTON, J. The facts of this case are as follows: The plaintiff was an undertaker and liveryman, and occupied his own carriage in front of a funeral procession of carriages and buggies, going north in Fourteenth street in Milwaukee towards the cemetery. About the time the plaintiff arrived at the crossing over North avenue, the car of the defendant was at the same crossing, going north on said avenue, and the car was suddenly stopped directly across Fourteenth street, which compelled the plaintiff to stop suddenly within about five feet of the car. This caused the first carriage in the rear also to stop suddenly, and its pole came in contact with the rear of his carriage and broke

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in its panels, and such injury is the plaintiff's cause of action.

There was no evidence in the case that materially changes or modifies this statement of the facts, although there was some testimony which we think tends more to confuse the case than to affect its merits. As the plaintiff was so stopped by the car he turned his horses to the right, thinking that perhaps he might go around the car on that side, but just as he did so he met the team of a farmer which had come down from the north, and which was trying to get around the car on that side. The plaintiff therefore turned his horses to the left, to get them out of his way, and the farmer drove around the east end of the car by going in the gutter and on the sidewalk. There is no evidence that the carriage of the plaintiff was moved at all from its first position when stopped. The heads of the horses only were turned. When asked, "Were your horses in the rear of the car?" the plaintiff answered, "No, sir; we *just wanted* to turn around, you know;" and repeated it. The plaintiff's carriage was not stopped by the farmer's team, as the learned counsel of the defendant contends. It is not likely that such a funeral procession would drive out into the gutter and on the sidewalk, to get around the car, and the defendant could not make such an unreasonable demand.

It is very clear from the evidence that whatever the plaintiff did or suffered in this emergency was caused by the sudden stopping of the car. A person who was in the second carriage testified that the plaintiff's carriage was stopped by the car, and was still standing there when the pole of his carriage crashed into it, and a person who rode in a top buggy 100 feet back testified that he heard the "smash" and breakage about the time his buggy was stopped, and he looked ahead and saw the car across the street. This must all have occurred almost instantly.

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There was no time for deliberation. The plaintiff supposed that the car would move right on, and its stopping suddenly took him by surprise. All the carriages were following his closely, and they were all stopped about the same time by the car of the defendant. If the second carriage had not been following closely upon the first, its pole would not have been run into its rear, as it was. If there was possibly any other pretended cause of the injury, it was connected and concurred with the sudden stopping of the car as the primary cause, and does not relieve the defendant. But all of such pretended intervening causes were only *conditions* upon which the first main cause operated, or with which it concurred to effect the injury.

On the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, which was granted on the ground, it is said, that the stopping of the car was not the *proximate* cause of the injury. The damages are said to be *proximate* when they are the direct, immediate, ordinary, usual, and natural result of the negligence, and therefore might have been reasonably expected. *In jure causa proxima non remota spectatur.* The damages must follow the negligence as the efficient cause, in unbroken sequence, without any intervening independent causes to break the continuity.

It seems to us that this case comes most clearly within these familiar principles. The carriages were nearly in "touch," and connected like one machine, and this sudden stopping of the car, as the cause, operated on all alike and nearly at the same time, and the injury was within this unbroken sequence. If each carriage, except the last, had been injured in the same manner, the damages would have been proximate to this sudden stopping of the car. It would be difficult to suppose a case that more perfectly illustrates the principle of proximate damages than this. All that occurred at the time that could possibly affect the plaintiff was connected with, and the consequence of, the

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stopping of the car across the street. The following are a few cases peculiarly illustrative of these principles in application to this case. The celebrated "squib case," *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892; Cooley, Torts, 71; *Oliver v. La Valle*, 36 Wis. 592; *Stewart v. Ripon*, 38 Wis. 584; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342; *McNamara v. Clintonville*, 62 Wis. 207; *Mittelstadt v. Morrison*, 76 Wis. 265; *Carter v. Towne*, 98 Mass. 567; *Cuff v. N. & N. Y. R. Co.* 35 N. J. Law, 32; *Selleck v. L. S. & M. S. R. Co.* 93 Mich. 375; *Johnson v. N. W. Tel. Exch. Co.* 48 Minn. 433; *West v. Ward*, 77 Iowa, 323; *Ala. G. S. R. Co. v. Chapman*, 80 Ala. 615; *Brown v. W., St. L. & P. R. Co.* 20 Mo. App. 222. These cases are none of them clearer examples of what are proximate causes than this case presents, but they illustrate the principles very clearly.

It seems to be conceded that the car obstructed Fourteenth street, in violation of a penal ordinance of the city. This fact was sufficient proof of negligence. *Mittelstadt v. Morrison*, 76 Wis. 265; *Wright v. M. & M. R. Co.* 4 Allen, 283; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. S. B. H. R. Co.* 129 Mass. 310.

We are compelled to differ from the learned superior court, and hold that the plaintiff made a case which would support a verdict in his favor, and that it was therefore error to grant the nonsuit and render a judgment dismissing the complaint.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

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VAN INGEN and others, Appellants, vs. FELDT, Respondent.

October 21 — November 7, 1893.

Voluntary assignment: Inventory: Trust funds: Discharge of assignor.

An insolvent debtor had received in trust moneys of a lodge of which he was a member, and had mingled them with his own moneys, but had afterwards loaned the amount thereof to a fellow-member as and for the moneys of the lodge. They were repaid to him after he had made an assignment for the benefit of his creditors, and were immediately returned by him to the lodge. *Held*, that the claim for the moneys so loaned was properly omitted from the schedule of his assets on the assignment, and hence that such omission was not a valid objection to his discharge from his debts.

APPEAL from the Circuit Court for *Milwaukee* County.

On September 19, 1891, the defendant, *Augustus C. Feldt*, made a voluntary assignment for the benefit of his creditors. His assignee administered his estate, and in due time filed his account, which was allowed by the court and said assignee was discharged. Afterwards, on June 13, 1892, the said *Feldt* filed his petition in the circuit court to be discharged from his debts under the statutes. Thereupon, and on the same day, the court ordered all his creditors to show cause, July 30, 1892, why he should not be so discharged, pursuant to law. At the time appointed, the appellants E. H. Van Ingen & Co., as creditors, appeared and filed several objections to such discharge, on the ground that he had omitted from his inventory certain property and assets. On September 26, 1892, the issue so raised was referred to Hugh Ryan, Esq., a circuit court commissioner, to hear, try, and determine.

On December 31, 1892, said referee filed his report, to the effect that the objections so filed by the plaintiffs to such discharge had not been sustained by proof, and that the said *Feldt* had in all respects complied with the provisions of the statutes in that regard, as amended, and was

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entitled to his discharge under the provisions thereof. On January 14, 1893, such report of said referee was wholly ratified and confirmed; and on February 11, 1893, the said *Feldt* was, by an order of said court, discharged from all his debts. From that order the plaintiffs appeal.

For the appellants there was a brief by *Miller, Noyes & Miller*, and oral argument by *F. A. Geiger*.

C. A. Koeffler, Jr., for the respondent.

CASSODAY, J. It is undisputed that *Feldt* neglected to include in his schedule of assets an interest he had in certain lots in the town site of Finney, and also a claim against one Berndt of between five and six hundred dollars. It is stated in the referee's report, in effect, that counsel for the plaintiffs, in their argument of the matter before him, abandoned all their objections except those based upon the failure of *Feldt* to schedule the Berndt claim, and that they frankly admitted that there was no evidence whatever of any fraudulent intent on the part of *Feldt* in failing to schedule that claim or the Finney lots; that in the early stages of the assignment proceedings in November, 1891, *Feldt* was examined by the plaintiffs and disclosed the facts mentioned, and that he had been closed up by the sheriff, and was entirely insolvent; that the plaintiffs took no steps to have such omitted property included in *Feldt's* assets; that *Feldt's* claim against Berndt was for moneys loaned from time to time, and that the moneys so loaned by *Feldt* were not his own, but belonged to the lodge of which he and Berndt were both members; that in January, 1892, Berndt repaid such moneys to *Feldt*, and he repaid the same to the lodge. It is true that *Feldt* mingled the lodge money with his own, and did not hand over to Berndt the specific moneys he received from the lodge, but did loan him the equivalent; that they were actually lodge moneys, and were returned by him to the lodge as soon as Berndt repaid them.

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Such being the facts, we are clearly of the opinion that *Feldt* was entitled to his discharge. Ch. 80*a*, S. & B. Ann. Stats., as to the discharge of insolvent assignors, is very much the same as ch. 179, R. S. Under this last chapter, it has, in effect, been held that the mere failure of an insolvent debtor to inventory all of his assets or property will not prevent his discharge. *In re Mabbett*, 73 Wis. 351. So it has been held, in effect, under ch. 80*a*, S. & B. Ann. Stats. (ch. 385, Laws of 1889), that the mere fact that an insolvent debtor had obtained money by means of false and fraudulent representations would not prevent his obtaining such discharge, although such discharge might not, possibly, operate to defeat an action by the creditor from whom the money was so obtained. *Hempsted v. Wis. M. & F. Ins. Co. Bank*, 78 Wis. 375. Where it appears that such insolvent debter has in *good faith* made a voluntary assignment for the benefit of his creditors, and has in all respects complied with the statute relating to the same and with the statute last cited, then he is entitled to such discharge. Sec. 1702*p*, S. & B. Ann. Stats. If the verification to his application for such discharge as prescribed by statute is true, then it would seem he is entitled to the same. Sec. 1702*f*. True, the inventory of *Feldt's* estate, as originally made, was not an accurate and complete statement of all his property not exempt, but the correction was made in his examination in the assignment proceedings a few weeks afterwards. The omission of the Finney lots appears to have been of trifling significance, and the objection on that ground appears to have been abandoned, and in other respects the verification appears to have been true. There was no disposing of any part of his property for the subsequent benefit of himself or his family, or in order to defraud any of his creditors, nor any falsely created or acknowledged indebtedness, within the meaning of the statute cited. The case is clearly distinguishable from *In re*

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Rankin, 85 Wis. 15. The mere omission from his inventory of the claim he held against Berndt, under the circumstances mentioned, was no valid objection to his discharge. The moneys *Feldt* received from the lodge were so received in trust for the lodge. Had he retained the moneys until he made the assignment, and then inventoried them and paid the same over to his assignee, and had the latter mingled the same with the other funds belonging to the estate, yet, under all the authorities, there can be no question that the lodge might have reclaimed the equivalent of the moneys so impressed with the trust. *In re Hallett's Estate*, 13 Ch. Div. 696; *Hancock v. Smith*, 41 Ch. Div. 456; *U. S. v. State Bank*, 96 U. S. 30; *Comm. Bank v. Armstrong*, 148 U. S. 50; *Cavin v. Gleason*, 105 N. Y. 256; *Atkinson v. Rochester P. Co.* 114 N. Y. 175; *Little v. Chadwick*, 151 Mass. 109; *Appeal of Hopkins*, 9 Atl. Rep. 867; *Slater v. Oriental Mills*, (R. I.) 27 Atl. Rep. 443. There are adjudications going still further. *McLeod v. Evans*, 66 Wis. 401; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133. The mere fact that *Feldt* mingled such trust moneys with his own, and then loaned their equivalent to Berndt, as and for the moneys belonging to the lodge, did not relieve the claim against Berndt from the trust thus impressed upon it; and hence that claim did not pass by the assignment, but was properly collected by *Feldt* and paid over to the lodge.

By the Court.— The order of the circuit court is affirmed.

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WERNER, Appellant, vs. ASCHER and others, Respondents.

October 21 — November 7, 1893.

Libel: Privileged communication: Manner of publication: Pleading.

An alleged libel was in the form of a petition or complaint to the town board for the purpose of obtaining a revocation of plaintiff's license to sell liquors, and was probably privileged if the only publication thereof was its presentation to said board. The complaint in the action alleged simply that said paper was maliciously written and published. *Held*, that on a demurrer *ore tenus* this should be construed as charging an unauthorized and improper publication or circulation of the paper, and hence that the complaint did not show on its face that the alleged libel was privileged.

APPEAL from the Superior Court of *Milwaukee* County.

Action for libel. Plaintiff was a saloon keeper in the town of Lake, Milwaukee county. The complaint charged in apt language that the defendants, maliciously intending to injure the plaintiff and his business, on the 10th of January, 1890, falsely and maliciously wrote and published a certain false, scandalous, and malicious libel of and concerning the plaintiff, which is set forth at length, with proper innuendoes. Sufficient allegations follow, showing that plaintiff's good name and reputation have been injured thereby, and that he has been driven out of his business as a saloon keeper.

The alleged libelous article set forth in the complaint begins as follows: "To the Honorable, the Board of Supervisors of the Town of Lake, in the County of Milwaukee: We, the undersigned, citizens and taxpayers of the town of Lake and city of Milwaukee, respectfully show to your honorable body." Then follow a series of statements charging in detail that the plaintiff has for more than a year kept a disorderly saloon, in which disorderly dances, disturbances, fights, and other breaches of the peace have fre-

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quently taken place, so that the saloon is a public nuisance; that the plaintiff allows minors to congregate and stay in his saloon and participate in such dances, and sells beer and intoxicating drinks to such minors. The paper closes with a prayer that plaintiff's license be revoked and said saloon be abolished. It is not alleged that the paper was ever verified, nor that it was ever presented to the board of supervisors; but it is alleged that it was written and published over the signatures of each and every of the defendants.

A part of the defendants answered, admitting that they signed the paper, but denying any publication of the same except presentation to the chairman of the board of supervisors of the town of Lake, and claiming that the same was a privileged communication. The truth of the matter stated in the petition was also alleged. Upon the trial a demurrer *ore tenus* was sustained by the court, and the complaint was dismissed. Plaintiff appeals.

For the appellant there was a brief by *John J. McAuliffe*, attorney, and *H. J. Killilea*, of counsel, and oral argument by *Mr. McAuliffe*. To the point that the fact that the libel assumed the form of a petition afforded no protection to defendants, they cited *State v. Burnham*, 9 N. H. 34, and cases; *King v. Root*, 4 Wend. 113; *Klink v. Colby*, 46 N. Y. 428. The most that can be claimed is that it was conditionally privileged, which is a defense to be pleaded and the burden of proof of which would be on defendants, express malice being alleged in the complaint. *Klink v. Colby*, 46 N. Y. 428–434, and cases.

For the respondents the cause was submitted on the brief of *Julius E. Roehr*. He cited *Larkin v. Noonan*, 19 Wis. 82; *Wilson v. Noonan*, 35 id. 321, 349; *Hart v. Baxter*, 47 Mich. 198; *Marsh v. Ellsworth*, 50 N. Y. 309; *Hastings v. Lusk*, 22 Wend. 410; *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420.

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WINSLOW, J. The trial court held that the complaint showed on its face that the alleged libel was privileged, and this is the only question presented. In support of the ruling it is said that the complaint shows this paper to be a complaint made to the town board of supervisors, under sec. 1558, R. S., for the purpose of obtaining a revocation of plaintiff's license as a saloon keeper; that this proceeding is judicial in its nature, and therefore the paper complained of is privileged. Probably, if the complaint showed that the only publication of the paper was its presentation to the board of supervisors of the town of Lake, the ruling of the trial court would be right, following the rule laid down in *Larkin v. Noonan*, 19 Wis. 82. The difficulty is, however, that the complaint charges no such thing. It simply alleges that the paper was maliciously written and published. We think this allegation must be held to rebut the idea that the paper was simply presented to the town board of supervisors. Certainly, under this allegation, it would be entirely competent for the plaintiff to prove that the paper was printed and distributed about the streets or posted on the bill boards, or otherwise circulated among the people for purposes of private spite, and not in a legitimate and *bona fide* attempt to institute a proceeding for the revocation of plaintiff's license. If this was the case, the fact that it was addressed to the board of supervisors, or was in the form of a complaint to revoke plaintiff's license under the statute, would not make it privileged. *State v. Burnham*, 9 N. H. 34. Upon demurrer *ore tenus* the court is inclined to give a more liberal construction to the pleading in favor of the pleader than upon demurrer regularly interposed, and under this rule we think the complaint should be construed as charging an unauthorized and improper publication or circulation of the paper. Upon the proofs when introduced, it may perhaps appear that

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the paper is privileged, but it does not so appear on the face of the complaint.

By the Court.—Judgment of the superior court reversed, and action remanded for a new trial.

NATIONAL DISTILLING COMPANY, Appellant, vs. CREAM CITY IMPORTING COMPANY, Respondent.

October 21 — November 7, 1893.

PLEADING. (1) *Striking out irrelevant defense.* (5) *Plea in abatement: Real party in interest.* (6) *Motion to make definite: Failure to determine.*

CONTRACTS. (2–4) *Sale of chattels: "Trusts:" Restraint of trade: Interstate commerce.*

1. Where a defense is irrelevant and of such a character that it may embarrass or prejudice the plaintiff, it should be stricken from the answer on motion.
2. The mere fact that the vendor of goods was a member of an unlawful trust or combination formed for the purpose of acquiring complete control and a monopoly of the trade in goods of that class, is no defense to an action against the vendee for the purchase price, the illegality being entirely collateral to the sale.
3. An agreement by which the vendee was to receive a rebate of the purchase price if, for a certain period, he made all his purchases of goods of that class from the trust or members thereof, did not render the sale invalid.
4. Where both vendor and vendee were corporations of the state in which the sale was made, it was not a transaction of interstate commerce, within the act of Congress of July 2, 1890.
5. In an action for the purchase price of goods, an allegation in the answer that plaintiff is a member of a trust or combination which is the real party in interest, is defective as a plea in abatement where it does not appear whether such trust is a partnership or a corporation and it is not alleged that it or any of its members other than the plaintiff had any interest in the goods sold or the money to be paid for them.
6. Where plaintiff moved to strike out one defense in an answer and to make the other more definite and certain, the failure to determine the second branch of the motion was a material error.

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APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this action is for a balance of $1,148.72, due for goods, wares, and merchandise, to wit, alcohol, spirits, whisky, etc., sold and delivered to the defendant at its special instance and request. The answer is to the effect that the plaintiff, prior to the sale and delivery of the goods, entered into an agreement with divers firms and corporations residing in different states for the purpose of forming a trust or conspiracy, whereby they agreed, combined, confederated, and associated themselves together for that purpose, and wrongfully to interfere with the freedom of trade and commerce, so that it might acquire the full, absolute, and complete control and monopoly of all alcohol, spirits, and liquors manufactured in the United States, and the exclusive right to regulate, dictate, and control the amount manufactured and the price thereof, and to render it impossible for dealers or consumers to purchase any such goods, etc., except from or through such trust, combination, etc.; that it was impossible for defendant to buy such goods through agents or members of said trust at their real market price, by reason of such combination, but it was compelled to pay a greater price therefor, and for the purpose of recovering back such overpayments on its purchases it was obliged to enter into an agreement to purchase all such goods used in its said business for the period of six months succeeding the date of purchases from said trust or members thereof, and by so doing it would then receive the amount of such overcharges; that defendant's business has been greatly injured by reason of said trust, etc., and by its business methods. And it was alleged on information and belief that said trust, confederation, or association, or the members thereof, were the real parties in interest in this action, and that the plaintiff is only an agent, member, or one of many partners residing in many and different states,

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and that the action should be dismissed unless brought in the names of all such real parties.

As a separate defense it was alleged that between the 22d of June and 22d of October, 1892, the defendant purchased goods, wares, and merchandise to the amount, as per bills rendered, of more than $3,500; that they were billed and charged to this defendant at a greater price than the market value, and with each bill an agreement in writing was given to it, a copy of which is made an exhibit, for rebate of charges as before stated; that the spirits, alcohol, whisky, brandies, liquors, and compounded liquors purchased as aforesaid were of an inferior quality, and were not of the proof marked upon the bills furnished with the same, and upon which proofs the price therefor is fixed; that all of said goods were of less value than charged, and less than the market price, and that many of the goods were almost wholly worthless, whereby defendant was damaged, and his customers quit trading with him for that reason; that defendant had paid on said purchases a sum exceeding $2,400, and that the value of said goods, etc., purchased by the defendant was not greater than that sum.

The plaintiff moved that the first defense of illegality should be stricken out as irrelevant and redundant, and that the second defense set up should be made more definite and certain by showing the date and amount of each item of goods which the defendant claims was defective, and by showing of what the defect consists, whether in quantity or quality, and the amount of damage claimed for each defective item or article. The court denied the motion to strike out the specified portions of the answer, with $10 costs, but did not make any order in respect to that part of the motion to make the second defense more definite and certain, and the plaintiff appealed.

Geo. E. Sutherland, for the appellant.

For the respondent the cause was submitted on the brief of *C. W. Briggs.*

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PINNEY, J. 1. Taking the allegations of the first defense in their most liberal sense, it is apparent that they are irrelevant and have no legal relation to the controversy between the parties to the action, which is whether the plaintiff shall recover the demand set forth in its complaint. It is obvious that they state no defense to the action; and it does not appear that any of the matters so set up can be material in any aspect of the case as now presented, but they are of such a character that they may embarrass and prejudice the plaintiff in preparing for trial and in maintaining its action upon the merits. An entire defense may be stricken out as irrelevant (R. S. sec. 2684); and where a defense is irrelevant and of the tendency above indicated, it ought to be stricken out on motion. *Horton v. Arnold*, 17 Wis. 139; *Joint School Dist. v. Kemen*, 65 Wis. 282. But in this instance the motion was denied, with $10 costs of motion against the plaintiff.

The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof, and to accomplish the ends therein set forth. It is not claimed in the answer that the trust or combination had acquired the control and monopoly of all such goods, or that the defendant might not have purchased the goods in question of other dealers in Milwaukee or elsewhere. Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of

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sale between the plaintiff and defendant was tainted with any illegality or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods in question of it at an agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination created with the intent and purposes set forth in the answer will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences. The defendant is not a party to any illegal contract, and the case is, therefore, not within the rule of *Wheeler v. Russell*, 17 Mass. 281, and many similar cases, to the effect that "no action will lie upon a contract made in violation of a statute or a principle of the common law;" for the right of the plaintiff to make the sale in question, or of the defendant to buy, was in no way connected with or dependent upon the alleged trust or combination, although the plaintiff was a member of it. These views are sustained and illustrated by the cases of *Brooks v. Martin*, 2 Wall. 70, and *Sharp v. Taylor*, 2 Phil. Ch. 801; and many other cases might be cited to the same effect. The provision for a rebate of a part of the purchase price to pur-

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chasers who would conduct their business in the manner stated in the answer was an inducement to them to continue their business relations with the plaintiff. It does not appear that there was any contract obliging the defendant to that course. A party may legally purchase the trade and business of another for the purpose of preventing competition, and the restraint of trade caused thereby is not, we think, unreasonable. *Mitchell v. Reynolds*, 1 Smith, Lead. Cas. (8th ed.) pt. 2, p. 756 (*417), and notes. And it would seem that an agreement between a number of dealers and manufacturers to raise prices, unless they practically control the entire commodity,—and this is not claimed of the trust in question,—cannot operate as a restraint upon trade, nor would it injuriously affect the public.

Both the plaintiff and defendant are Wisconsin corporations, and the goods in question were sold in this state. The sale, therefore, was not a transaction of interstate commerce, and was not within the act of Congress of July 2, 1890. 26 Stats. at Large, 209.

The allegation that the trust or combination is the real party in interest in this action, and that it can only be maintained by it, and should be dismissed unless brought in its name or the names of all the members thereof, is fatally defective as a plea or defense in abatement. It does not appear whether the alleged trust or combination is a partnership or a corporation, and so a legal entity, capable of suing or being sued; nor is it averred that it or any of its members other than the plaintiff had any interest in the goods sold or the money to be paid for them. The answer in this respect deals only in conclusions of law, leaving wholly uncontroverted the allegations of the complaint that the goods in question were sold and delivered by the plaintiff to the defendant at a price agreed upon between them; nor does it deny the allegation of indebtedness

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therefor to the plaintiff. It fails to state any facts showing that the action is not rightly brought in the name of the plaintiff.

2. The circuit court omitted, inadvertently as we presume, to pass upon the second branch of the plaintiff's motion, namely, to make certain portions of the second defense more definite and certain. It is correct practice, we think, to combine in a single motion as many objections as the plaintiff supposes the defendant's answer is subject to, with a view of having them all determined at the same time, and not piecemeal, thus avoiding a multiplicity of motions and possible appeals. The plaintiff had an undoubted right to have its motion decided in all its material aspects, and, without indicating any opinion whether the motion as to the second defense should have been to make it more definite and certain or for a bill of particulars thereof, we hold that it was material error for the circuit court to omit or fail to determine this branch of the motion, for, until determined, the plaintiff could not secure the rights which the statute gives it in respect to such pleading, to either have the same made more definite and certain or a bill of particulars under it, and it is thereby deprived of all remedy it may have in this respect.

For these reasons the order of the circuit court is erroneous, and must be reversed, and the cause remanded to the circuit court for further proceedings according to law.

By the Court.—It is so ordered.

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SMITH, Appellant, vs. DIAMOND, Respondent.

October 21 — November 7, 1893.

Partnership: Action for dissolution: Counterclaim.

In an action for the dissolution of a partnership, the defendant cannot plead as a counterclaim any claim against the plaintiff individually, no matter how it arose. So *held*, where the counterclaim alleged was for the amount of defendant's capital in the business, upon a stipulation in the partnership articles that plaintiff would, after a certain time, on notice, pay that amount to defendant for his interest in the business.

APPEAL from the Circuit Court for *Milwaukee* County.

The action is to dissolve a partnership between the parties. The complaint charges divers breaches of the partnership agreement by defendant, to the damage of the firm, and demands the appointment of a receiver of the partnership effects, an accounting, and the closing of the partnership business. Defendant, in his answer, denies the alleged breaches of the partnership contract on his part, and charges that plaintiff has been guilty of breaches thereof on his part, to the great damage of the firm.

The partnership articles set out in the complaint contain a stipulation that if, at the end of one year from March 13, 1891, defendant should notify plaintiff that he desired to withdraw from the business, plaintiff agreed to pay him a sum equal to the capital he had invested in the business and ten per cent. interest thereon, within ninety days after such notice, for the defendant's interest in the business, which the latter was thereupon to convey to plaintiff. The cause was pending and at issue when the stipulated year expired. At its expiration defendant duly notified plaintiff of his desire thus to withdraw from the business. More than ninety days after such notice was given, defendant, by leave of court, interposed an amended and sup-

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plemental answer, containing a counterclaim against the plaintiff for the capital invested by him in the business, alleged to be $3,000, and the agreed interest thereon.

The plaintiff appeals from an order overruling a general demurrer to such counterclaim.

For the appellant there was a brief by *Markham & Kerwin*, and oral argument by *J. C. Kerwin*.

For the respondent the cause was submitted on the brief of *Somers & Dorr*. To the point that the counterclaim was properly pleaded, they cited sec. 2656, R. S.; *Heckman v. Swartz*, 55 Wis. 174; *Sprout v. Crowley*, 30 id. 187; *Orton v. Noonan*, 29 id. 547; *Hopkins v. Gilman*, 47 id. 581.

LYON, C. J. The action involves only the transactions and dealings of the firm of Smith & Diamond, and of the partners with the firm, and the obligations and liabilities of each of such partners to the firm, and through it to each other. Neither partner can assert and enforce in this action any individual claim against his copartner, no matter how such claim arose or what the state of the accounts of each partner with the firm may be. The reason is plain. A partner has no claim against his copartner individually, on account of partnership transactions. If a partner is in arrears in his partnership accounts, he is the debtor of the firm, not of his copartner. *Sprout v. Crowley*, 30 Wis. 187. But if he owes an individual debt to his copartner (as in the case just cited) the firm has nothing to do with it, and a claim therefor by the creditor partner cannot have any place in an action to dissolve the partnership and settle its affairs.

It is of no significance that the counterclaim is based upon a stipulation in the copartnership agreement. It is only a personal contract between the parties, with which the firm has no concern, and it might as well have been made at another time, or in respect to property in which

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the firm never had any interest. The counterclaim is not within the letter or spirit of the statute (R. S. sec. 2656),[1] is not the proper subject matter of equitable counterclaim in this action independently of the statute, and is not supported by any of the adjudications to which we have been referred. The demurrer should have been sustained.

By the Court.— The order appealed from is reversed, and the cause will be remanded with directions to the circuit court to sustain the demurrer to the counterclaim.

SANBORN, Respondent, vs. PERRY and others, Appellants.

September 11—November 28, 1893.

(1) *Appeal: Judgment for costs.* (2) *Foreign judgment: Limitation of actions.*

1. A judgment for costs is appealable.
2. A claim against the estate of a decedent was disallowed by a probate court in Minnesota, and such disallowance was affirmed on appeal by a district court of that state, on the ground that the claim was barred by the statute of limitations. Such disallowance and affirmance, having in Minnesota the force and effect of a judgment in favor of the estate, are given the same force and effect in this state, pursuant to sec. 1, art. IV, Const. of U. S.

APPEAL from the Circuit Court for *Douglas* County.

On September 25, 1858, the plaintiff and one French recovered judgment in the district court for Ramsey county, Minnesota, against William Hollinshead for $3,674. That

[1] Sec. 2656, R. S., provides that a counterclaim, to be pleadable, "must be one . . . arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, express or implied, and existing at the commencement of the action."— REP.

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judgment was affirmed on appeal by the supreme court of Minnesota, July 23, 1859, and the same was docketed August 16, 1859, and has never been paid. On February 20, 1860, said French died, and the plaintiff became the owner of the entire judgment.

On December 25, 1860, the said William Hollinshead, being then and for a long time prior thereto a resident and citizen of said Ramsey county, died intestate, leaving a widow and four minor children. His widow and one Masterson, since deceased, were appointed to administer his said estate, which consisted of a large amount of property not inventoried and a large amount of debts. Commissioners upon the claims against said estate were appointed by the probate court of Ramsey county in 1861, and again in 1871, but none of them ever qualified, and it does not appear that said estate was ever settled. In 1889 the plaintiff petitioned the probate court of Ramsey county for the allowance of said judgment as a claim against said estate, and upon a hearing of that petition the said probate court disallowed said claim and the whole thereof, October 9, 1889. Said petitioner thereupon appealed from said disallowance to the district court of said Ramsey county, where such disallowance was affirmed June 3, 1890, and it was held by said district court on said appeal that said claim was barred by the statutes of limitation of Minnesota, and that the plaintiff was entitled to no relief, and judgment was entered therein accordingly.

On November 18, 1890, upon proceedings properly had in the county court of Douglas county, Wisconsin, a decree was entered to the effect that said heirs of the said William Hollinshead had inherited the lands of which he died seised in said Douglas county. On September 22, 1891, the plaintiff petitioned the county court of Douglas county for administration of said real estate in that county, and, due notice of the hearing of said petition having been given,

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the purchasers of said real estate from said heirs appeared and resisted the same. After the hearing, and on December 14, 1891, the said county court for Douglas county denied said application, principally on the ground that said judgment of the probate court of Ramsey county, affirmed in the district court of that county, is conclusive upon the rights of the plaintiff, and forever estopped him from asserting any claim on said judgment against said estate. On appeal from that judgment to the circuit court for Douglas county the same was, December 19, 1892, reversed and remanded for further proceedings according to law, and judgment was therein ordered against these defendants for the plaintiff's costs and disbursements. From the judgment entered accordingly the defendants appeal.

For the appellants there was a brief by *Catlin & Butler & Carl C. Pope* and *Murphy & Bundy*, and oral argument by *Carl C. Pope.* They argued, among other things, that "if a person having a demand against another presents it as a cause of action or a counterclaim, and the statute of limitations is successfully interposed against it, he cannot assert it in another state, though it is not there barred by the statute. The judgment, being conclusive against him where entered, is equally so in every other state." Freeman, Judgm. sec. 575; *Sweet v. Brackley*, 53 Me. 346; *Wernse v. McPike*, 100 Mo. 476; *Weeks v. Harriman*, 65 N. H. 91; *Sanderson v. Peabody*, 58 id. 116–119.

For the respondent there was a brief by *William M. Gill* and *Charles J. Berryhill*, and oral argument by *Mr. Berryhill.*

The following opinion was filed September 26, 1893:

CASSODAY, J. Counsel for the plaintiff moves to dismiss the appeal on the ground that it is taken from a mere interlocutory order by which the defendants are in no way aggrieved. But, as indicated in the foregoing statement, the

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appeal is from a judgment inflicting costs upon the defendants, and is clearly appealable. *Cleveland v. Burnham*, 60 Wis. 16; *Sutton v. Wegner*, 72 Wis. 294. The motion to dismiss is denied.

The question presented by the record turns upon the effect to be given to the disallowance of the plaintiff's claim by the probate court of Ramsey county, Minnesota, October 9, 1889, and the affirmance thereof by the district court of the same county, June 3, 1890. By the stipulation and agreement of the parties made in the trial court, and of record herein, the statutes and laws of Minnesota, and the decisions of the supreme court of that state, as to the questions here involved, are to be considered and taken as evidence in this case. The debtor died December 25, 1860, and administrators of his estate were thereupon appointed by the probate court of Ramsey county, in which he resided at the time of his death. Upon granting letters of administration, the statute of that state required commissioners to be appointed to examine and adjust all claims and demands against the estate. Sec. 1, ch. 53, Gen. Stats. 1878. The statutes of that state also required the probate court to limit the time within which such claims should be presented, not exceeding eighteen months in the first instance, and which time the court was at liberty to extend, so that the whole time should not exceed two years from the time of appointing such commissioners. Secs. 6, 7, Id. The statutes of that state also provided that "in no other case, except such as are expressly provided for in this chapter, shall any action be commenced or prosecuted against an executor or administrator." Sec. 53, Id. The case at bar does not come within the exceptions therein expressly made. True, the commissioners appointed failed to qualify, but the statute of that state also required the judge of the probate court to perform the duties conferred upon such commissioners. Ch. 69, Laws of 1879. We perceive no

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reason why the plaintiff might not have presented his claim and forced the settlement of the estate. The supreme court of that state appears to have frequently held that every claim which is not presented for allowance within the time limited by the probate court for that purpose is forever barred, unless it came within some one of the exceptions named in the statutes. *Comm. Bank v. Slater*, 21 Minn. 172, 174; *Fern v. Leuthold*, 39 Minn. 212; *Hill v. Townley*, 45 Minn. 168; *Hill v. Nichols*, 47 Minn. 382. The law as thus declared was, in effect, continued and preserved by the new "Probate Code" of that state, which was enacted and approved April 24, 1889, and which by its express terms went into force and effect October 1, 1889, being eight days prior to the disallowance of the plaintiff's claim by the probate court of Ramsey county. Secs. 102–115; 2 Stats. Minn. 1891, secs. 5715–5729. Moreover sec. 102 of that Probate Code expressly declares that "the allowance or disallowance of any claim *shall have the same force and effect as a judgment for or against the estate.*" Id. sec. 5715. Thus it appears that the disallowance of the plaintiff's claim by the probate court, October 9, 1889, had the force and effect of a judgment in favor of the estate and against the plaintiff; and of course the affirmance of that judgment by the district court, June 3, 1890, had the same force and effect, and therefore was conclusive upon the plaintiff in that state, whatever may have been the law of Minnesota prior to that enactment. If the plaintiff was dissatisfied with such adjudications of the probate and district courts, he had his remedy by appealing to the supreme court of that state. His failure to appeal would seem to indicate an absence of any doubt as to the correctness of that judgment.

The question here presented is whether that judgment shall have the same force and effect in this state that it has

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in that state. The constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Sec. 1, art. IV. This provision is binding upon the courts of this state as well as the courts of other states. The provision quoted has frequently been construed by the supreme court of the United States, and such construction is necessarily binding upon all state courts. Following *Mills v. Duryee*, 7 Cranch, 481, it was said by MARSHALL, C. J., speaking for the whole court, in *Hampton v. McConnel*, 3 Wheat. 235, that: "The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." So in *McElmoyle v. Cohen*, 13 Pet. 325, 326, Mr. Justice WAYNE, speaking for the whole court, said: "The faith and credit due to it [the foreign judgment] as the judicial proceeding of a state is given by the constitution, independently of all legislation." And again, quoting from Mr. Story's Commentaries, he said: "If a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere in the states of the Union. If reexaminable there, it is open to the same inquiries in every other state." Numerous cases in the same court might be cited to the same effect. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615; *Huntington v. Attrill*, 146 U. S. 657. In a very recent case it has been held by that court that "the construction given by the supreme court of a state to a statute of limitation of the state will be followed by this court, even in a case decided the other way in the circuit court [of the United States] before the decision of

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the state court." *Bauserman v. Blunt*, 147 U. S. 647. See, also, *Morgan v. Hamlet*, 113 U. S. 449.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to affirm the judgment of the county court.

Upon a motion for a rehearing, counsel for the respondent contended, *inter alia*, that the judgment in Minnesota disallowing the claim determined merely that the remedy to enforce it was barred by the statute of limitations of that state. It did not determine the merits, but merely that there was no remedy under the laws *of that state*, and that is its only force and effect. But it does not follow that there is no remedy in Wisconsin. "It is only the remedy and not the cause of action that is barred by the foreign statute; the foreign prescription is no more than a limitation of time within which the action must be brought in the foreign state." Piggott, Foreign Judgm. 202; *Huber v. Steiner*, 2 Bing. N. C. 210, 2 Scott, 304; *Harris v. Quine*, L. R. 4 Q. B. 657, 38 L. J. Q. B. 331, 20 L. T. R. N. S. 947; *Kipp v. Johnson*, 31 Minn. 360; *Townsend v. Jemison*, 9 How. 407; *Taylor v. Barron*, 35 N. H. 484; *Bank of U. S. v. Donnally*, 8 Pet. 361, 370; *Brent v. Bank of Washington*, 10 Pet. 617; Wood, Lim. sec. 8; Story, Confl. of Laws (8th ed.), sec. 582; 13 Am. & Eng. Ency. of Law, 703 G.; Sutherland, Stat. Const. 626; *Hendricks v. Comstock*, 12 Ind. 238; *Paine v. Drew*, 44 N. H. 306; *Perkins v. Guy*, 55 Miss. 153; *David v. Porter*, 51 Iowa, 254; *Baker v. Stonebraker*, 36 Mo. 338; *McMerty v. Morrison*, 62 id. 140.

The motion was denied November 28, 1893.

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BROSDE, Respondent, vs. SANDERSON and another, Appellants.

October 21—November 28, 1893.

Criminal law and practice: Justices' courts: Adjournments: Loss of jurisdiction: Waiver: False imprisonment: Damages.

1. A justice of the peace loses jurisdiction if he fails to enter on his docket the time and place to which a case is adjourned; and in a criminal case the imprisonment of the defendant after such adjournment is unlawful.
2. If such loss of jurisdiction can be waived in a criminal case by the subsequent appearance of the defendant without objection, such appearance must be a voluntary one. An appearance in order to avoid default on a bond and loss of money deposited to secure his appearance, is not voluntary.
3. An award of $250 damages for a false imprisonment of two days is *held* not excessive.

APPEAL from the Circuit Court for *Milwaukee* County.

False imprisonment. The plaintiff was arrested by defendant *Heiden*, a constable, on a valid criminal warrant issued by the defendant *Sanderson*, a justice of the peace. He was brought before the justice August 1, 1891, arraigned, and pleaded not guilty, whereupon he asked for a continuance to obtain witnesses until August 3d. The continuance was granted, and the plaintiff was committed to jail in the meantime, but the justice did not enter in his docket the time or place to which the case was adjourned. The defendant *Heiden* took the plaintiff to jail, where he was imprisoned until August 3d, when *Heiden* again brought him before the justice. Another adjournment was had until August 4th, and the plaintiff gave his own recognizance for his appearance, and deposited $40 with the justice to secure his bond. On August 4th the plaintiff appeared pursuant to his recognizance, and the action was dismissed without trial. The plaintiff paid his attorney $10 out of the $40

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deposited in court; also the justice's, constable's, and witnesses' fees; and received back out of the $40 but $8.19. The damages were laid at $1,000, besides the $31.81 paid for costs, etc. The jury returned a verdict for the plaintiff for $250, on which judgment was rendered, and defendants appeal.

The cause was submitted for the appellants on the brief of *J. M. Clarke*, and for the respondent on that of *John J. McAuliffe* and *J. C. McKenney*.

Counsel for the appellants cited *Witt v. Henze*, 58 Wis. 244, 246–7; *Storm v. Adams*, 56 id. 137, 145; *Coffee v. Chippewa Falls*, 36 id. 121, 125–6; *Blackwood v. Jones*, 27 id. 498; *French v. Ferguson*, 77 id. 124; *Weeks v. Lyon*, 18 Barb. 530; *Tifft v. Culver*, 3 Hill, 180.

WINSLOW, J. It is manifest that the justice completely lost jurisdiction of the case after the first adjournment by not entering on his docket the time and place to which the case was adjourned. *Brahmstead v. Ward*, 44 Wis. 591. The plaintiff's imprisonment after this adjournment was without warrant of law, there being no action then pending. The circuit judge so charged the jury, and the charge was plainly right.

It is claimed that this defect or loss of jurisdiction was waived by the appearance of the plaintiff, without objection, on the 4th of August. Conceding that such a jurisdictional error might be waived in a criminal case by an appearance without objection, it is very certain that the appearance must be a voluntary one to have such an effect. In this case the appearance on August 4th cannot be called voluntary. He had been compelled to give bond and deposit money to secure his appearance, and he was compelled to appear in order to avoid default on his bond and loss of the money deposited. Such an appearance is substantially coerced. It would be a misnomer to call it vol-

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untary. It is said that the constable was protected by valid process. He neither pleads nor shows in evidence any process after the first warrant.

The damages do not seem excessive. We see no error in respect thereto.

By the Court.— Judgment affirmed.

FABER, Respondent, vs. MATZ and another, Appellants.

October 21 — November 28, 1893.

Debtor and creditor: Fraudulent conveyances: Creditors' action: Pleading: Jurisdiction: Res adjudicata.

1. In a creditors' action under sec. 3029, R. S., the failure of the complaint to contain, in form, the averments in respect to collusion specified in Circuit Court Rule XXVIII, sec. 1, is not ground of demurrer.
2. It is a sufficient compliance with said rule if the complaint states facts from which the lack of collusion, etc., are apparent.
3. The circuit court for Milwaukee county may entertain an action in the nature of a creditors' bill upon a judgment of the superior court of that county, to enforce satisfaction thereof out of property fraudulently conveyed by the judgment debtor.
4. The pendency of proceedings supplementary to execution on a judgment is not a bar to a creditors' action to reach property fraudulently conveyed by the judgment debtor to a third person.
5. The judgment on the debt is conclusive in the creditors' action as to the validity and justice of the plaintiff's claim.
6. Voluntary conveyances by a judgment debtor to a third person of substantially all her property not exempt from execution, upon a trust and benefit reserved to her, are fraudulent as a matter of law.

APPEAL from the Circuit Court for *Milwaukee* County.

This is an action in the nature of a creditors' suit to set aside as fraudulent a deed of conveyance of a certain lot in the city of Milwaukee and the assignment of two mortgages by the defendant *Christiana Matz* to the defendant *Henry Dittmar*, her nephew, being substantially all her

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estate, and she being at the time indebted to the plaintiff in the sum of about $400, but owing no other debts. The action was founded on a judgment recovered by the plaintiff against said *Christiana Matz* in the superior court of Milwaukee county, December 27, 1890, execution having been issued thereon and returned wholly unsatisfied. Proceedings supplemental to execution had been instituted against her and the said *Dittmar*, but appear to have been abandoned. The action was begun December 22, 1891, in the superior court of Milwaukee county, but was transferred to the circuit court for Milwaukee county, where, upon trial, a judgment was rendered, from which this appeal is taken.

The complaint is substantially in the usual form, and charges that the defendant *Christiana Matz* had a certain lot in the city of Milwaukee, which was occupied by a tenant, and that she made a fraudulent conveyance of said lot to her nephew, *Henry Dittmar*, for the purpose of preventing her creditors, and particularly the plaintiff, from collecting the amount of their debts out of the lot, and alleges the fraudulent assignment for like purposes of a certain mortgage on a certain lot in Milwaukee, which had been her homestead; and charges that she and *Dittmar* have, or one of them has, property, credits, and effects of said *Christiana Matz* liable to execution, either in possession, or fraudulently concealed so that the same cannot be found, or held in trust, for the purpose of hindering, delaying, and defrauding plaintiff in the collection of his judgment. The complaint did not contain any allegation in form to the effect that the action was not commenced or prosecuted by collusion with the judgment debtor for the purpose of protecting her property or effects against the claim of other creditors, but for the sole purpose of compelling payment and satisfaction of plaintiff's own debt, as required by rule XXVIII, Circuit Court Rules.

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The defendants answered separately, insisting that the transfers alleged were made in good faith and for a valuable consideration, and denying the allegations of the complaint. At the trial the defendants demurred *ore tenus* to the complaint, but the court overruled the demurrer.

It was found that the defendant *Christiana Matz* had been the owner in fee simple of lot 2 in block 3, subdivision 5, in the Ninth ward of Milwaukee, which lot was not owned and occupied by her as a homestead, but had been for a long time, and still was, occupied by her tenant, and that it was incumbered by a mortgage for $500, then due; that on the 26th of August, 1890, the defendant *Christiana Matz* executed and delivered to the defendant *Dittmar* a deed of conveyance purporting to convey to him said lot; that it was executed for the purpose of deceiving and hindering the creditors of *Christiana Matz*, and especially the plaintiff, and was fraudulent and without any valuable consideration, the defendant *Dittmar* knowing the purpose for which it was made and colluding in that behalf with the said *Christiana Matz* for the purpose aforesaid; and that on the same day said defendant *Matz* executed an assignment of a certain note and mortgage particularly described in the finding, without any consideration and for the like fraudulent purpose, to the said *Dittmar;* and that she has no other property than the said lot and said $500 mortgage out of which the plaintiff's claim could be collected. The court adjudged said deed of conveyance of said lot and the assignment of said mortgage fraudulent and void, and that the same be vacated and set aside, and that the defendant *Dittmar* assign and transfer the note and mortgage to a receiver, and that he take possession of the said lot and sell and dispose of the same and apply the proceeds, or so much as might be necessary, to the satisfaction of said judgment, with interest, costs, etc.

It appeared from the testimony of the defendants that

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on the 26th day of August, 1890, said *Christiana Matz* conveyed the said lot to the defendant *Dittmar*, and also assigned to him a mortgage for $1,500, as well as the mortgage for $500, because she was old and had made up her mind to come and live with *Dittmar;* that he paid her $1 for each paper, and was to keep and support her and do all that was necessary for her as long as she lived, and that he was now carrying out that agreement, and she had lived with him ever since. He was to bury her when she died, pay her funeral expenses, and set up a tombstone for her, and distribute about $500 among her brothers and sisters. The mortgage for $1,500 was given for the purchase money of her homestead, sold and conveyed to one Richert, the mortgagor. Testimony was given tending to show that the defendant *Christiana Matz* was about leaving town about the 20th of August, 1890, and the plaintiff called on her for payment of the amount due him; that she promised to send the defendant *Dittmar* down to the plaintiff's office at 4 o'clock; that he accordingly came, and offered $50 to settle the claim upon which the judgment was afterwards obtained, the plaintiff offering to take $200 rather than to have more trouble about it; but *Dittmar* told him if he did not take $50 he would not get anything. Assignments of the mortgages and the conveyance of the lot in question were executed a few days thereafter. The circuit court held that the $1,500 mortgage for part of the purchase money of the homestead of the defendant *Matz* was exempt. The action for the recovery of the debt was undefended, and plaintiff obtained judgment for $439.57 by default. *Dittmar's* agreement to support *Christiana Matz*, etc., was oral, and there was no security given for its performance.

The cause was submitted for the appellants on briefs by *J. M. Clarke*, and for the respondent on the brief of *Rietbrock & Halsey.*

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To the point that the circuit court could not take jurisdiction while proceedings to enforce the judgment of the superior court were still pending in that court, counsel for the appellants cited 12 Am. & Eng. Ency. of Law, 292; *Orient Ins. Co. v. Sloan*, 70 Wis. 611, 617; *Fenske v. Kluender*, 61 id. 602; *Coon v. Seymour*, 71 id. 340.

PINNEY, J. 1. It is objected that the complaint is insufficient, because it does not contain, in form, the averments specified in sec. 1, rule XXVIII, of the rules of practice of the circuit court. The allegations required by this rule are not of the substance of the cause of action, which is complete without them. The object of the rule is to guard against fraud and collusion between the plaintiff and the judgment debtor, and to protect the rights of third parties. The want of such an averment might be ground for staying the action or taking the complaint off the files, on the application of a proper party, unless the defect was supplied; but is not ground of demurrer. The complaint states facts from which it is apparent that there is no collusion between the parties, and that the plaintiff was prosecuting the action for the sole purpose of compelling payment and satisfaction of his judgment; and this is a sufficient compliance with the rule. *Marston v. Dresen*, 76 Wis. 418.

2. The objection that the circuit court had no jurisdiction to entertain an action in the nature of a creditors' bill upon a judgment of the superior court of Milwaukee county, to enforce its satisfaction out of the property fraudulently conveyed by the judgment debtor, is clearly untenable. This action, however, was commenced in the superior court, and transferred to the circuit court.

3. The proceedings supplementary to execution commenced on the judgment, if still pending and properly pleaded, would not be a bar to this action. The object of the action is to reach property fraudulently assigned and

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conveyed to a third party, and his rights could not be adjudged in respect to it save in a plenary action brought by a receiver appointed in the supplementary proceedings. The plaintiff had his election either to obtain the appointment of a receiver in whose name the action might be brought, or to proceed in his own name under sec. 3029, R. S. *Bennett v. McGuire*, 58 Barb. 625; *Gates v. Young*, 17 N. Y. Weekly Dig. 551.

4. The judgment in favor of the plaintiff against the defendant *Matz*, upon which the action was based, is conclusive as to the validity and justice of the plaintiff's claim, and it could not be impeached in this action. *Carpenter v. Osborn*, 102 N. Y. 552; *Decker v. Decker*, 108 N. Y. 128.

5. The burden of proof to show that the lot conveyed by the defendant *Matz* to *Dittmar* was her homestead was on the defendants, but it is plain from the evidence that this lot was not, and never had been, her homestead, and that the conveyance of it to *Dittmar*, as well as the assignment to him of the mortgage of $500, were without valuable consideration, and were voluntary conveyances made upon a trust and benefit reserved to the judgment debtor, and constituted substantially all her property not exempt from execution. Under such circumstances these transfers are fraudulent as a matter of law, and upon proof of these facts a trust in the property assigned and conveyed results in favor of the creditors of the defendant *Matz*, who made them. "The law imputes fraud to such transactions. A man involved in debt has no right to give away all his property at the expense of his creditors. He must be just before he is generous." *Marston v. Dresen*, 76 Wis. 418, 421; *Severin v. Rueckerick*, 62 Wis. 1; *Daskam v. Neff*, 79 Wis. 164. That *Dittmar* had full knowledge of the facts, and that the deed and assignment were fraudulent as a matter of law, whatever may have been the intent of the parties, as against the plaintiff, is very plain. The court

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could not hesitate to set them aside as fraudulent, and its judgment to that effect is correct.

By the Court.— The judgment of the circuit court is affirmed.

THE STATE EX REL. TIBBITS, Appellant, vs. THE CITY OF MILWAUKEE and another, Respondents.

November 7 — November 28, 1893.

Certiorari: To whom directed: Cities.

1. Where the common council of a city is a continuing body and has the control of all its records, while the city clerk having the custody thereof is a mere ministerial officer, a writ of *certiorari* to review proceedings of the council should be directed to that body, and not to the clerk or to the city itself.
2. Where a writ of *certiorari* has been misdirected it may be superseded before, as well as after, its return.

APPEAL from the Circuit Court for *Milwaukee* County.

A writ of *certiorari* was allowed and sued out of the circuit court for Milwaukee county, on the relation of *George M. Tibbits*, to review and reverse and set aside, for alleged illegality, certain proceedings of the common council of the city of *Milwaukee*, in opening, widening, and extending Kane place from Prospect avenue to Summit avenue, in the Eighteenth ward in said city, and confirming the report of damages for property taken for that purpose, and the assessment of benefits upon property alleged to be benefited thereby. The relator was the owner of certain lots assessed for such benefits. The writ was directed to "*The City of Milwaukee* and *George R. Mahoney*, as city clerk," etc., and was superseded and vacated by the circuit court because it was not directed to the proper party. From an order to that effect, the relator appealed.

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David S. Ordway, for the appellant, to the point that the writ was directed to the proper parties, cited *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; *State ex rel. Manitowoc v. County Clerk*, 59 id. 15; *State ex rel. Smith v. Cooper*, id. 666; *Moore v. S. & St. C. R. Co.* 34 id. 173; *Wilson v. Heller*, 32 id. 457–466; *State ex rel. Flint v. Fond du Lac*, 42 id. 294–5; *People ex rel. Muir v. Throop*, 12 Wend. 183.

For the respondents there was a brief by *Conrad Krez*, city attorney, and *V. W. Seely*, assistant city attorney, and oral argument by *Mr. Krez*.

PINNEY, J. The circuit court could not review the proceedings mentioned in the writ in this case, for the reason that it was not directed to the body or board whose acts were sought to be questioned and reviewed by it. By sec. 1, ch. 4, of the city charter of *Milwaukee* (Laws of 1874, ch. 184), it is provided that "the municipal government of the city shall be vested in the mayor and common council," and the common council is a continuing body (sec. 2, ch. 4, of the charter) and has the control of all its records and papers, while the city clerk has the custody thereof and of the corporate seal and is a mere ministerial officer, without any judicial or *quasi* judicial power. It is a general rule that the writ of *certiorari* cannot go to a mere ministerial officer, save in exceptional cases, as where the body or board whose acts are sought to be reviewed is not a continuing one, or has ceased to exist, and such ministerial officer has the proper custody of the record or proceeding sought to be reviewed. Such was the case of *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, explained in *State ex rel. Flint v. Common Council*, 42 Wis. 287, 294. The latter was a case identical with this in respect to the direction of the writ, and conclusively shows that in this case the writ should have been directed to the common council, and not to the city clerk. The fact that the writ

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is directed also to the city as a corporate body will not obviate the objection. The city in its corporate capacity has no judicial or *quasi* judicial power in the premises, and for that reason the writ should not have been directed to it. The error of directing such a writ to the corporation in street cases was noticed and held fatal in *Bogert v. Mayor*, 7 Cow. 158; *In re Mt. Morris Square*, 2 Hill, 14. The authorities are very numerous to the effect that, where the acts of a corporate board or of corporate officers are the proper subject of review by writ of *certiorari*, the writ must be directed to such board or officers, and not to the corporation. 5 Wait, Pr. 471; Mechem, Pub. Off. §§ 1001, 1007, and cases cited; *In re Mt. Morris Square*, 2 Hill, 14.

Where the writ has been misdirected, it may be superseded before its return, as well as after. *Ball v. Warren*, 16 How. Pr. 379; *Saratoga & W. R. Co. v. McCoy*, 5 How. Pr. 378; *Ferguson v. Jones*, 12 Wend. 241. And if it has been returned the court may order it quashed or vacated. Tidd, Pr. 403; 5 Wait, Pr. 474, 475. The circuit court properly vacated the writ.

By the Court.— The order of the circuit court is affirmed.

THORMAEHLEN, Respondent, vs. KAEPPEL, Appellant.

November 7 — November 28, 1893.

Contracts: Infancy: Disaffirmance: Reasonable time: Retaining consideration: Fraud: Equity: Estoppel.

1. A note and mortgage having been executed by an infant, her disaffirmance thereof within three and one-half months after she attained majority is *held* to have been within a reasonable time, it not appearing that during said time there was any material change in the relation of the parties to the securities or in the value of the mortgaged land.

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2. An infant married woman having executed a mortgage of land owned by her to secure a loan of money to her husband, the fact that a part of the money was used to discharge a debt secured by another mortgage theretofore executed by her upon the same land does not render the later mortgage valid to that extent unless the earlier mortgage was valid as against her.
3. The mere failure of the infant, in such case, to inform the mortgagee that she was an infant or that the earlier mortgage was not valid as against her,—there being no misrepresentation of fact, and no artifice employed to mislead the mortgagee,—was not such a fraud as would preclude her from having the mortgage set aside in a court of equity.

APPEAL from the Circuit Court for *Milwaukee* County.

This action is to set aside and cancel a certain mortgage executed by plaintiff to defendant during her minority, on her separate real estate, to secure a loan made by defendant to her husband. It is unnecessary to state the pleadings. The findings of fact are within the pleadings, and are supported by the testimony. They are to the following effect: Plaintiff intermarried with William Thormaehlen in 1888, when she was eighteen years of age, and on June 18, 1890, executed with him a mortgage to plaintiff, on certain lands owned by her, to secure the payment of money borrowed of defendant by her husband. She also signed the note with her husband for the loan. The plaintiff and her husband have been divorced since this action was commenced. No part of such loan was received by the plaintiff or used for her benefit. Plaintiff became twenty-one years of age November 24, 1891; and on March 7, 1892, she caused to be served on defendant a notice that she disaffirmed such securities, and "that she did not recognize the mortgage as a lien upon the lands described therein, or the note as in any manner binding upon her as a personal obligation." Since coming of age, plaintiff has not ratified the note and mortgage, and the mortgage is a cloud upon the title to her land.

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The conclusions of law deduced by the court from such findings are as follows: "The court finds that said plaintiff is entitled to a judgment requiring said defendant to execute and deliver to said plaintiff a release of any and all interest which he may claim to have in said premises under and by virtue of said mortgage, or that in default thereof said mortgage shall be declared by the judgment of this court to be null and void and to constitute no lien upon the plaintiff's real estate, and that by the judgment of this court the said plaintiff's claim to said premises be established against any claim of the said defendant, and that said defendant be, by the judgment of this court, forever barred against having or claiming any title to the said premises adverse to the said plaintiff, and that said plaintiff have judgment against said defendant for disbursements in this action." Judgment for the plaintiff was thereupon ordered and entered pursuant to such conclusions of law. Defendant appeals from the judgment.

F. J. Lenicheck, for the appellant.

For the respondent there was a brief by *Ogden, Hunter & Bottum*, and oral argument by *L. M. Ogden.*

LYON, C. J. Subject to certain conditions, it is a general rule of law that on becoming of full age a person may disaffirm his contract made during minority, and be relieved from the obligations thereof. One of these conditions is that he must so disaffirm within a reasonable time after attaining his majority. *O'Dell v. Rogers*, 44 Wis. 136, 183. Another condition is that if he has received and retains any part of the consideration for his contract he must return the same before he will be allowed to assert the invalidity of his contract because of his infancy when he made it. The latter rule was applied by this court in *Callis v. Day*, 38 Wis. 643, and *Knaggs v. Green*, 48 Wis. 601. Still another condition of obtaining relief in equity is that

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the party asking relief has not fraudulently induced the other party to enter into the contract. Unless the plaintiff is subject to one of these conditions, she is entitled to the relief which the judgment gives her.

1. It is maintained on behalf of defendant that plaintiff did not disaffirm her contract expressed in the note and mortgage within a reasonable time after she reached her majority. She disaffirmed it within three and one-half months thereafter, and it does not appear that during such time the relation of the parties to the securities, or the value of the mortgaged land, materially changed. Within the rule of *O'Dell v. Rogers* (in which case a delay to disaffirm for nearly three years was held not unreasonable), we think the disaffirmance in this case was notified to defendant within a reasonable time after plaintiff became of age.

2. Counsel also maintains that the case is within the rule which, under certain circumstances, requires the party disaffirming his contract for infancy to restore the consideration paid by the other party. The difficulty with this claim is that the plaintiff never received any portion of such consideration, and hence has none of it to restore. It is argued, however, that because of a fact proved, but not stated in the findings, it ought to be held that in contemplation of law the plaintiff did receive and retains the consideration for her note and mortgage, and hence is within the rule requiring a return to defendant of the money loaned. Such fact is that the money, or a large portion of it, loaned by defendant, for which the note and mortgage were given, was used to pay and discharge a debt secured by another mortgage theretofore executed by plaintiff upon the same land, and hence was paid for the benefit of plaintiff. The claim is that the mortgage in controversy should be held valid at least to the amount of the former mortgage thus discharged by such payment. The infirmity in the

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argument is that there is nothing in the proofs to show the existence of any condition which would render such former mortgage valid as against plaintiff. It must be assumed that she was under no obligation to pay the debt it was given to secure in order to relieve her land from the lien of it. It was entirely a voluntary payment, and we are unable to perceive how the fact that such payment was made out of the money loaned by defendant can operate to make the mortgage in controversy valid.

3. It is further claimed that plaintiff was guilty of fraud because she failed to inform defendant, when she executed the mortgage, that she was a minor, or that the former mortgage was not valid as against her. We suppose, of course, that a court of equity would refuse to relieve an infant of his contract if his own fraud induced the other party to enter into it. But we do not think the authorities will sustain the court in holding that the mere failure of plaintiff to impart such information, unasked,— there being no misrepresentation of fact, and no artifice employed to mislead the defendant,— amounts to a fraud which would close the doors of the court against her.

By the Court.— The judgment of the circuit court is affirmed.

CUMMINGS, Respondent, vs. TOWN OF LAKE REALTY COMPANY, imp., Appellant.

November 7 — November 28, 1893.

(1) *Pleading: General demurrer by one defendant.* (2, 3) *Real estate brokers: Option to buy or sell land: Sale to third person: Action for services.*

1. A general demurrer by one defendant separately should be sustained if the complaint does not state a cause of action as to him.
2. The owner of land gave to one J. the exclusive option of buying or selling it on or before a certain date at a certain price. J. gave to

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C. an option to buy the land on or before said date at a higher price, and agreed to pay him $1,000 if he did so. C. paid J. for said last-mentioned option, and also performed services for J. in procuring purchasers for the land, but the negotiations for the purchase were not completed on the date to which the options were limited, and the land was afterwards sold by the owner directly to said purchasers. *Held*, that C. had no cause of action against the owner of the land, either for the amount which he paid to J. for the option or for his services in procuring the purchasers.

3. Rights under an option to buy or sell land on or before a certain date expire on that date without notice or declaration of forfeiture; and a mere prolongation of the negotiations for a sale until the evening of the last day does not warrant the holder of the option in believing that no forfeiture will be insisted upon.

APPEAL from the Superior Court of *Milwaukee* County.

Action by *L. L. Cummings* against the *Town of Lake Realty Company* and Richard Jefferson to recover $250 paid by the plaintiff to said Jefferson for an option to buy certain land, and for services performed by the plaintiff in procuring a purchaser and negotiating a sale of said land. The substance of the complaint is stated in the opinion. The defendant corporation demurred to the complaint on the ground that it "does not state facts sufficient to constitute a cause of action." The court held that such demurrer was "insufficient, for the reason that it is general and not special." From the order overruling the demurrer the defendant corporation appealed.

For the appellant there was a brief by *Ogden, Hunter & Bottum*, and oral argument by *L. M. Ogden*.

For the respondent there was a brief by *Austin & Hamilton*, and oral argument by *C. H. Hamilton*. They contended, *inter alia*, that as the complaint admittedly states a cause of action as to the defendant Jefferson, a general demurrer will not lie. The defendant corporation should have demurred on the ground that the complaint

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did not state a cause of action *as to it*. *Willard v. Reas*, 26 Wis. 544.

Orton, J. This is an appeal from an order overruling the demurrer of the corporation defendant alone, on the ground that the complaint fails to state a cause of action. The reason given by the court for overruling the demurrer is "that it is *general*, and not *special*." This is a general demurrer interposed by the corporation defendant alone, and it certainly had the right to demur alone. The other defendant did not *join* in the demurrer. We fail to understand the reason given. *Arzbacher v. Mayer*, 53 Wis. 380. The question on this appeal is whether the complaint states a cause of action against the corporation defendant. The complaint states substantially the following facts:

The corporation owned certain twenty acres of land in section 36, township 6, range 22 east, in Milwaukee county, and on the 14th day of May, 1892, in consideration of $200 paid down, agreed to give Richard Jefferson the exclusive option of buying or selling, on or before October 1, 1892, said land, for the sum of $950 per acre; $950 to be paid October 1, 1892, the said $200 to be deducted; $6,650 to be paid on October 15, 1892, and $1,500 to be paid October 1, 1893; the balance to be paid within five years from date of exchange of papers,—with interest at six per cent. per annum, to be secured by mortgage on said land; the corporation to furnish abstract of title and have the land surveyed. On the 9th day of July, 1892, Richard Jefferson, in consideration of $250 paid down, agreed to give *L. L. Cummings* the exclusive option of buying said land on or before October 1, 1892, for the sum of $1,100 per acre, to be paid as follows: $2,450 cash on October 1, 1892; $6,500 cash on October 15, 1892; $1,500 cash on October 1, 1893; the balance within five years from date of exchange of

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papers,— with interest at six per cent. per annum, payable semi-annually, secured by mortgage on the premises; the said Jefferson to furnish abstract of title. By an agreement between the said Jefferson and *Cummings*, on the 3d day of September, 1892, on consideration of $1, the above rate per acre and payments were changed as follows: $1,050 per acre; $1,050 October 1, 1892; $1,500 October 1, 1893; and the balance within five years from date of exchange of papers,— with interest on all sums at the rate of six per cent. per annum, payable semi-annually, and secured by mortgage on the premises. Jefferson agrees to give *Cummings* $1,000. It is averred, also, that the plaintiff performed labor and services for the defendant Jefferson, in procuring Bohman and Kroeger to become the purchasers of said land, of the value of $1,000.

The plaintiff, the officers of the corporation, and the defendant Jefferson met with the proposed purchasers, the said Bohman and Kroeger, on the 1st day of October, 1892, and engaged in the negotiations for said sale, and said proposed purchasers attempted to make payment upon the same; but said agreed negotiations were prolonged until the evening of that day, and the officers of the corporation, by taking part in said negotiations, acquiesced in the continued validity of the contract, and led the plaintiff to believe, by continuing the negotiations looking to another meeting of the parties, that no forfeiture would be insisted upon, and refused to answer the direct question whether they would insist upon a forfeiture. The president of the corporation advised the plaintiff on Saturday, October 1st, that he would do what he could to continue the option given to the plaintiff until the next Monday, October 3, 1892; but on said 3d day of October, without notice to the plaintiff, and without declaring any forfeiture of the contract, the said corporation, with the assent of Jefferson, sold and conveyed the said land to the said Bohman and

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Kroeger, the same persons whom the plaintiff procured to purchase the same, at the same price and on the same terms fixed in said negotiations on October 1, 1892.

The plaintiff demands judgment for the $250 he paid down to said Jefferson, and the $1,000 for his said services.

1. It is perfectly clear that the corporation defendant is not connected in any way with this cause of action. It was the defendant Jefferson who agreed to pay the plaintiff $1,000, and his labor and services in procuring a purchaser were rendered for the said Jefferson. It is not alleged that they were rendered for the corporation, or that the corporation ever employed the plaintiff to perform such services, or agreed to pay him for the same. The $250 was paid by the plaintiff to the said Jefferson, and not to the corporation.

2. The option was not continued until October 3, 1892, and it expired on the 1st day of October, and the negotiations were not concluded or the sale made on that day. The plaintiff alleges only that he was led to believe that no forfeiture would be insisted upon, and he was led so to believe by the prolongation of the negotiations until the evening of October 1, 1892. This was not sufficient ground for such a belief. But this was immaterial. The fact remains that the option was not continued after that evening. The president of the corporation informed the plaintiff that he would do what he could to continue the option until October 3d, but it is not alleged that he ever did anything to that effect. No actual forfeiture of the contract was necessary. It was a mere option, and it expired by its own limitation on October 1, 1892, and it was not continued or renewed. The plaintiff's rights under the contract were at an end, and he cannot, therefore, sue on the same.

3. The option to the plaintiff was to *buy* the land, and not to *sell* it.

The complaint fails to state a cause of action against the

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corporation, and the demurrer ought to have been sustained.

By the Court.—The order of the superior court is reversed, and the cause remanded with direction to sustain the demurrer.

As to rights conferred by a "refusal" or "option," see note to *Litz v. Goosling*, (Ky.) 21 L. R. A. 127.—REP.

SPITZ and another, Respondents, vs. MOHR and others, Appellants.

November 7 — November 28, 1893.

Attachment: Demand not yet due: Affidavit.

1. Where the affidavit for an attachment upon a demand not yet due states, as required by statute, that the debt is *to become due*, the writ is not invalidated by an unnecessary recital therein to the effect that it "appears from said affidavit that the whole amount *due* the said plaintiffs" is a certain sum.
2. The affidavit for an attachment, made by one of the plaintiffs, states that the defendants (naming them) are indebted to the plaintiffs, etc., and that the affiant has good reason to believe, etc., "that *the parties aforesaid* have assigned," etc., their property with intent to defraud their creditors. *Held*, that "the parties aforesaid" refers to the defendants specifically named, and that the affidavit is a sufficient compliance with the statute requiring it to state "that *the defendants* have assigned," etc.

APPEAL from the Circuit Court for *Milwaukee* County.

At the times herein mentioned, the plaintiffs were copartners doing business in Chicago under the firm name of Spitz, Landauer & Co., and the defendants were copartners doing business in Milwaukee under the firm name of G. Mohr & Co. On March 28, 1893, this action was commenced to recover the amount secured by four certain prom-

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issory notes, amounting in the aggregate to $2,100, each of which was to become due thereafter. At the time of commencing the action one of the plaintiffs made an affidavit, which, after entitling the same, is as follows:

"*Herman Landauer*, being duly sworn, says he is one of the above-named plaintiffs and makes this affidavit on their behalf; that the above-named defendants, *G. Mohr*, *C. V. Eller*, and *R. Heins*, are indebted to the plaintiffs in a sum exceeding $50,— that is to say, in the sum of $2,100 over and above all legal setoffs,— and that the same is to *become* due upon express contract; and this deponent further says that he has good reason to believe, and verily does believe, that the *parties aforesaid* have assigned, conveyed, disposed of, or concealed, or are about to assign, convey, dispose of, or conceal, their property, or some part thereof, with intention to defraud their creditors."

Such affidavit was accompanied by the requisite undertaking in three times the amount named in the affidavit, to wit, $6,300, conditioned as required; and a writ of attachment was thereupon issued in the form prescribed by sec. 2730, R. S., reciting that it "appears from said affidavit that the whole amount due the said plaintiffs is the sum of $2,100, with interest," and commanding the sheriff to "attach and safely keep all the property of the said defendants in your county, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, together with the costs and expenses, as a security for the satisfaction of such judgment as the plaintiffs may recover in said action." By virtue thereof the sheriff did, March 28, 1893, seize the stock of goods of the defendants in Milwaukee, subject to a prior attachment.

Upon the records, pleadings, and proceedings in the action, and upon the affidavit, undertaking, and writ of attachment served therein, and the levy made thereunder, the defendants moved the court, April 22, 1893, to dismiss

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the attachment and the levy made thereunder, and to dissolve and vacate all proceedings had in this action, or for such other or further order in the premises as the court should be pleased to grant, together with the costs of motion, for six several reasons stated in the notice of such motion. Upon the hearing of said motion, and on April 29, 1893, it was overruled, with $10 costs. From that order the defendants appeal.

For the appellants there was a brief by *Bloodgood, Bloodgood & Kemper*, and oral argument by *J. B. Kemper*. As to the strictness with which the statute must be followed in cases of this kind, they cited *Miller v. Munson*, 34 Wis. 580; *Gowan v. Henderson*, 55 id. 341; *Streissguth v. Reigelman*, 75 id. 212; *Bradley v. Croft*, 19 Fed. Rep. 295; *Burnside v. Davis*, 65 Mich. 74; *Goodyear R. Co. v. Knapp*, 61 Wis. 103.

Charles Friend, for the respondents.

CASSODAY, J. The demand upon which this suit is brought was not due at the time of the commencement of this action. An attachment in such case is authorized upon the ground mentioned in the affidavit set forth in the foregoing statement. S. & B. Ann. Stats. sec. 2731, subd. 2; Laws of 1880, ch. 233, 256; Laws of 1885, ch. 39. The same proceedings are to be had in such case and the same affidavit is required as in actions upon matured demands, except that the statute requires the affidavit to "state that the debt is to *become* due." S. & B. Ann. Stats. sec. 2731. The affidavit in the case at bar did so state. True, the writ unnecessarily recites that "it further appears from said affidavit that the whole amount *due* the said plaintiffs is the sum of $2,100," etc.; but the affidavit was attached to the writ, and both were served upon the defendants at the same time, so that they were thereby informed that the word "due" was not used in the writ in the sense of the debt

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being then mature and payable, but rather in the sense of liability or indebtedness,— that the same was then owing to the plaintiffs. In other words, the inaccuracy in the use of the word in the writ corrected itself by asserting that it so appeared from the affidavit. Besides, the statute does not require the writ to state whether the indebtedness is due or to become due. R. S. sec. 2730. It is the affidavit that gives the jurisdiction; and that, as already observed, truly stated that the indebtedness was "to become due."

It is, moreover, contended that the affidavit is fatally defective in stating "that the *parties aforesaid* have assigned," etc., instead of stating, in the language of the statute, "that the *defendants* have assigned," etc. R. S. sec. 2731. It is claimed, in effect, that "the parties aforesaid" may refer to the plaintiffs alone, or to the plaintiffs and defendants together, or possibly to the defendants alone; and hence that it is so indefinite and uncertain that perjury cannot be predicated upon the affidavit. But we are constrained to hold that "the parties aforesaid," as used in the affidavit, when fairly construed, necessarily refers to the three defendants therein specifically named. They are the only persons whose names are given in the body of the affidavit, and they are so given before the words quoted. Under the statute as it now stands the affidavit is amendable "at any time before the trial." Laws of 1883, ch. 249; S. & B. Ann. Stats. sec. 2731*a*. This being so, it should, at least, be fairly construed. By such construction it has meaning and significance. The sharp, technical construction sought to be applied to it would make it without meaning and even ridiculous.

By the Court.— The order of the circuit court is affirmed.

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BOND, Appellant, vs. NEUSCHWANDER, Garnishee, Respondent.

November 8 — November 28, 1893.

Vacating judgment by default against insane garnishee.

1. Judgment by default having been rendered against a garnishee who was insane when the summons was served upon her, it was proper, under sec. 2832, R. S., upon that fact being made to appear, to open the default and allow her to answer.
2. The property claimed to be in the hands of such garnishee being real estate which, she being insane, could only be transferred by authority of court, plaintiff was not prejudiced by an order vacating the judgment absolutely instead of allowing it to stand as security to him pending the determination of the issue.

APPEAL from the Superior Court of *Milwaukee* County.

The appeal is from two orders. On September 24, 1892, the plaintiff obtained judgment by default against Nicholas Neuschwander, the principal defendant, for $6,854.34, and on October 1, 1892, judgment by default was rendered against *Appolonia Neuschwander*, his wife, as garnishee, for the amount of the principal judgment and costs. In March, 1893, a petition was filed on behalf of the garnishee defendant, signed and verified by her husband, the main defendant, asking to have the judgment against the garnishee opened and vacated on the ground that the garnishee was insane at the time of the service of the process upon her. This petition was not entertained by the court, because no guardian *ad litem* had been appointed for the garnishee. Afterwards, the husband, Nicholas Neuschwander, was appointed such guardian *ad litem*, and filed a new petition in that capacity, praying for the opening of the judgment and the setting aside of the service of the summons. This petition alleged positively the insanity of the garnishee for more than three years. It also contained an affi-

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davit of merits and a denial of any liability as garnishee at the time of the service of the summons, substantially as required by sec. 2759, R. S. Accompanying this petition was a physician's certificate that the garnishee was insane, and an affidavit by one Laudon that he had been well acquainted with the garnishee for three years, and that she had been insane for all that time. Upon hearing this petition the court made an order, April 17, 1893, vacating and setting aside the judgment against the garnishee. The plaintiff thereafter moved the court to vacate the order of April 17th, and in lieu thereof make an order stating, as the reason for vacating the judgment, the fact that the garnishee defendant was a married woman. This the court refused, but amended the order of April 17th by inserting at the end thereof: "And said garnishee defendant is allowed to answer and defend in this action." A second motion was made by plaintiff to vacate the order of April 17th. On this motion a number of affidavits were filed on behalf of the garnishee defendant, conclusively showing her insanity for more than a year previous to the motion. The motion to vacate was denied May 20, 1893, and from the orders of April 17th and May 20th the plaintiff appeals.

A. J. Eimermann, for the appellant.

For the respondent there was a brief by *Austin & Hamilton*, and oral argument by *C. H. Hamilton.*

WINSLOW, J. The court was entirely right in opening the default and allowing the garnishee defendant to answer. Such a course was the only proper one when it appeared, as it did without dispute, that the garnishee was insane when the summons was served upon her. R. S. sec. 2832;[1] *Gerster v. Hilbert*, 38 Wis. 609. The verified petition con-

[1] R. S. sec. 2832, provides that the court may relieve a party from a judgment against him through his mistake, surprise, or excusable neglect.—REP.

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tained an affidavit of merits as well as a sworn denial of all liability, substantially sufficient as an answer under sec. 2759, R. S., so all the technical requirements necessary to authorize the court to open the default were complied with.

It is true that the court went further than would be justified in an ordinary case of opening a judgment and allowing a defense to be made. Ordinarily, the default should be set aside and the judgment should be allowed to stand as security to the adverse party, pending the determination of the issue; but in this case, it appearing that the property claimed to be in the hands of the garnishee is real estate, and she being insane, so that a transfer thereof could only be made by authority of court, it does not appear that the plaintiff is prejudiced by the absolute vacating of the judgment.

No other points require notice.

By the Court.—Orders affirmed.

WILLIAMSON, Respondent, vs. THE MICHIGAN FIRE AND MARINE INSURANCE COMPANY, Appellant.

November 8 — November 28, 1893.

Insurance against fire: Loss payable to mortgagee: Assignment of policy: Who may maintain action?

A provision in a policy of insurance against fire that the loss, if any, shall be payable first to a mortgagee or his assigns as his interest may appear, does not operate as an assignment of the policy, whether the mortgage debt be greater or less than amount of the insurance; and in case of a loss an action on the policy must be brought in the name of the insured, though the mortgagee, in respect to his interest, may be joined as a coplaintiff.

APPEAL from the County Court of *Winnebago* County.

This action was brought to recover a loss which occurred under a policy of insurance issued by the defendant, April

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7, 1891, to the estate of Jennie Stillwell. On the 2d day of August, 1883, Jennie Stillwell was the owner of the property insured, and on that day executed and delivered a note and mortgage securing the same on the premises in question to Jennie Perkins for $500, no part of which has been paid; and on the 4th day of April, 1891, the plaintiff became the owner of this note and mortgage. Prior to the date of the policy, Jennie Stillwell, the mortgagor, died, leaving one child, Jennie Stillwell, her sole heir at law and the owner of the premises. No administrator has ever been appointed on the estate of said Jennie Stillwell, deceased, but on the 7th day of April, 1891, the said policy of insurance was issued by the defendant company to "the estate of Jennie Stillwell," whereby it is claimed that the defendant did insure said estate of Jennie Stillwell, for the period therein stated, against loss or damage by fire, in the sum and to the amount of $400, on the one-story, frame, shingle-roof building, occupied as a dwelling house and millinery store, on lot 23, block 4, etc., in Neenah, Wis., "loss, if any, first payable to Jennie Perkins or assigns, as her mortgage interest may appear."

Plaintiff alleged in his complaint that as mortgagor, from and since the 4th day of April, 1891, he had an interest in the property so insured in an amount exceeding said insurance, to wit, in the sum of $500. The property thus insured was entirely destroyed by fire November 18, 1891, and the plaintiff brings this action for the recovery of the sum named in the policy. The defendant, in its answer, alleged, among other things, that the plaintiff had not at the time of the loss, nor at any time since, any title to or interest in the property in question, except jointly and individually with one Jennie Stillwell; that she was the owner in fee thereof, and that she had an interest in the property, the subject of the action, jointly with the plaintiff; and that she is still living and the heir at law of Jennie Stillwell, deceased.

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Upon trial before the court without a jury, the court held that the plaintiff had a right, upon these facts, to recover in his own name, and gave judgment accordingly, from which the defendant appealed.

For the appellant there was a brief by *Eaton & Weed*, and oral argument by *H. I. Weed.*

For the respondent there was a brief by *Thompsons, Harshaw & Davidson*, and oral argument by *J. C. Thompson.* To the point that the mortgage debt being greater than the amount of the insurance, the plaintiff might maintain the action alone in his own name, they cited *Hammel v. Queen Ins. Co.* 50 Wis. 240; *Appleton Iron Co. v. Brit. Am. Ass. Co.* 46 id. 23; *Maxcy v. N. H. F. Ins. Co.* 55 N. W. Rep. (Minn.), 1130; *Ill. Mut. F. Ins. Co. v. Fix*, 53 Ill. 151; *Weed v. L. & L. F. Ins. Co.* 116 N. Y. 106; *N. W. Mut. L. Ins. Co. v. German F. Ins. Co.* 40 Wis. 446; *Armstrong v. Agricultural Ins. Co.* 56 Hun, 399; *Hall v. Fire Asso.* 64 N. H. 405; *Crisman v. State Ins. Co.* 16 Oreg. 285; *Grosvenor v. Atlantic F. Ins. Co.* 17 N. Y. 391; May, Ins. sec. 449; *Kimball v. Noyes*, 17 Wis. 696; *Gillett v. L. & L. & G. Ins. Co.* 73 Wis. 203.

PINNEY, J. The plaintiff could not maintain an action upon the policy in question as sole plaintiff. The legal right of action was in the insured, and the provision in the policy, "loss, if any, first payable to Jennie Perkins or assigns, as her mortgage interest may appear," operated only as a conditional appointment or order to pay so much of the proceeds of the policy as might be equal to the amount due on the mortgage at the time of, and in the event of, a loss under it. It was not operative *in præsenti*, and the insured was still the owner of the policy. If the mortgage was paid before any loss occurred it could not become effective. These considerations serve to show that, whether the mortgage debt be greater or less than the amount of

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the policy when written, such a provision in favor of a mortgagee does not operate as an assignment of the policy. It is still the owner of the premises who is insured, and the contract of the company is with him alone, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it. It is not the interest of the mortgagee in the premises that is insured; and it seems clear, therefore, that an action for the recovery of the money in case of loss must be brought in the name of the insured, but that the mortgagee, in respect to his interest, may be joined with him as a coplaintiff. The recent cases of *Hodgson v. German Ins. Co.*, *ante*, p. 323, and *Chandos v. American F. Ins. Co.* 84 Wis. 184, are decisive of the question involved. 2 Wood, Ins. 1122; *Martin v. Franklin F. Ins. Co.* 38 N. J. Law, 140; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 613; *Warbasse v. Sussex Co. Mut. Ins. Co.* 42 N. J. Law, 206,— may be referred to in addition to the authorities cited in these cases.

It is not the interest of the mortgagee that is insured, but the interest of the mortgagor; and it seems illogical to say that whether such an appointment will operate as an assignment of the policy, if it can so operate at all, is dependent upon whether the sum due on the mortgage is greater or less than the amount of the loss. The company says, in substance, to the insured: "In consideration of the stipulated premium, we insure *you* against loss by fire on the property described, in the sum of $400; and at your request, in case a loss occurs, we will pay it to J. P., to the extent that any sum may then remain due on his mortgage." This is clearly not an assignment of the policy so that in case of loss the mortgagee alone may sue and recover for it. It is no more than a conditional appointment or agreement for the future appropriation of all or a part of the moneys that may become due under the policy, according to future events, depending for its opera-

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tion upon an actual loss and something remaining due on the mortgage. The case is not one of a defect of parties, but of a want of sufficient interest in the plaintiff to enable him to recover. The judgment of the county court is erroneous and must be reversed.

By the Court.—The judgment of the county court of Winnebago county is reversed, and the cause remanded for a new trial and with directions that the insured be properly made a party to the action.

PAINE LUMBER COMPANY (LIMITED), Respondent, vs. THE CITY OF OSHKOSH, Appellant.

November 8 — November 28, 1893.

Municipal corporations: Opening street: Temporary injunction: Discretion: Appeal.

A temporary injunction granted in an action to restrain a city from opening a street which for more than thirty years it has allowed the plaintiff and its grantors to occupy to the exclusion of the public, will not be disturbed on appeal where it is not shown that, if allowed to stand, it will result in any special harm to the city or any citizen.

APPEAL from the Circuit Court for *Winnebago* County.

On a replat of the city of *Oshkosh*, made in 1859, the tract of land in the Fifth ward between West Algoma, High, James, and Pearl streets is platted as blocks 119 and 122, and between these blocks, extending from High to Pearl street, is platted as Henry street, sixty feet wide, which has never been opened to public use. Both of these blocks are owned, and, together with Henry street, have been occupied, by the plaintiff company and its grantors more than thirty years with buildings and as a lumber yard. In August, 1890, the mayor and common council of

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Oshkosh passed a resolution directing the city attorney to institute proceedings to open Henry street between said blocks and beyond to public use as a street. Thereupon plaintiff commenced this action in equity to restrain the city from thus opening Henry street between High and Pearl streets. The complaint alleges the above facts and others which it is claimed show an abandonment of Henry street by the city. It also sets out several general statutes concerning highways in support of its claim of abandonment, and alleges that such statutes are in force in defendant city. The city answered to the merits.

On notice and order to show cause, and after arguments by counsel for both parties, the court, on the pleadings alone, granted an injunction restraining the city from opening the street between said blocks during the pendency of the action. The city appeals from such order.

H. I. Weed, for the appellant.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *C. W. Felker*. To the point that the appellate court will not, in a case like this, review the discretion of the court below upon conflicting facts set forth in the pleadings or affidavits, they cited 2 High, Inj. sec. 1696; *Strasser v. Moonelis*, 108 N. Y. 611; *Selchow v. Baker*, 93 id. 59; *Heiss v. Vosberg*, 59 Wis. 532, 539; *Hill v. Lockwood*, 62 id. 507.

LYON, C. J. This appeal is from an order granting a temporary injunction, the granting of which is largely within the discretion of the court. The city has remained quiet for more than thirty years, and has allowed plaintiff and its grantors to occupy the *locus in quo* during all that time to the exclusion of the public. Nothing appears in the pleadings showing any change of circumstances, or that the city or any citizen of the state will be specially injured if the injunction be allowed to stand until the hear-

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ing. Under these circumstances we do not feel called upon to determine the merits of this controversy on the present appeal. That can best be done after the testimony has been taken, and on the final hearing. All we now determine is: It is not made to appear that the order appealed from, if allowed to stand, will result in any special harm to the city or any citizen of the state. All other questions are reserved. We affirm the order for the reason stated, but without prejudice to the right of the city, on a proper showing, to move the circuit court to vacate the preliminary injunction, and to appeal from an order (if one be made) denying such motion.

By the Court.— Order affirmed.

GAYNOR, Respondent, vs. BLEWETT, imp., Appellant.

November 8 — November 28, 1893.

Mortgages: Foreclosure: Order for judgment for deficiency: Appeal: Married women.

1. That part of a judgment of foreclosure which orders a personal judgment for any deficiency after sale of the mortgaged premises, is appealable.
2. Although a married woman joined with her husband in executing a note and mortgage, there should be no judgment against her for any deficiency on foreclosure of the mortgage, unless she signed the note on account of her separate property or to charge the same.

APPEAL from the Circuit Court for *Winnebago* County.

Action to foreclose a mortgage. The facts are stated in the opinion.

Maurice McKenna, for the appellant, to the point that judgment against the appellant for a deficiency would not be proper, cited *Brown v. Kennicott*, 30 Ill. App. 89; *Mack*

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v. Austin, 29 Hun, 534; *McKeon v. Hagan*, 18 id. 65; *Life Asso. of Am. v. Lessler*, 19 Alb. Law J. 399; *Manhattan L. Ins. Co. v. Glover*, 14 Hun, 153; *Emmett v. Yandes*, 60 Ind. 548; *Avery v. Vansickle*, 35 Ohio St. 270; *Munson v. Dyett*, 56 How. Pr. 333; *Heburn v. Warner*, 112 Mass. 271; *Kitchell v. Mudgett*, 37 Mich. 81; 1 Black, Judgm. sec. 119, and notes 21, 28; *Gould v. McFall*, 111 Pa. St. 66; *Jones v. Merritt*, 23 Hun, 184; *Mack v. Austin*, 95 N. Y. 513.

Geo. E. Sutherland, for the respondent.

ORTON, J. This is an appeal by *Margaret R. Blewett* from the judgment of foreclosure against Edmund Blewett and herself, to reverse that part of the same which orders a personal judgment against her for any deficiency. The said *Margaret*, the appellant, set up in her answer that at the time she joined with the said Edmund Blewett in the execution of said note and mortgage she was a married woman and the wife of said Edmund Blewett, and the plaintiff admitted the same. There is no allegation in the complaint that she signed said note on account of her separate property or estate, or to charge the same, or that she had any separate estate. The plaintiff, however, asks in her complaint that such an order be made a part of the judgment of foreclosure. The statute (sec. 3156, R. S.) requires that judgment for the deficiency *shall be ordered* in the original judgment. The order is a necessary part of the judgment of foreclosure, and it is a final adjudication of the defendant's common-law liability for the debt. The formal judgment is rendered and docketed as of course, on the coming in and confirmation of the report of sale showing the amount of the deficiency. It is contended by the learned counsel of the respondent that this part of the judgment is not appealable, and that the appellant should have waited until the rendition of the final judgment. There appears no good reason why the defendant may not

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appeal from the judgment, and try to get rid of this adjudication of her personal liability for the debt, before such formal judgment is rendered. As an independent order it is appealable, because it involves a part of the merits of the action. R. S. sec. 3069. The case of *Rogers v. Weil*, 12 Wis. 664, is in point, both as to appealability of this part of the judgment and the error of it as against a married woman, as in this case. In that case the order is called "a judgment for any deficiency the sheriff *might* report due after the sale." This language shows that it was not the judgment after the sheriff *has* reported the deficiency, but for the deficiency he *might* report in the future. It is clearly the same judgment appealed from as in this case. The judgment of this court in that case shows it even more clearly, viz.: "So much of the judgment of the circuit court *as gives* a personal judgment, etc., must be reversed, and the judgment *in all other respects* is affirmed." It was also held in that case "that the plaintiff ought not to have a personal judgment against the wife in such a case without showing in the complaint that the contract signed by her related to her own separate property and was one upon which she might become liable to a personal judgment." In *T. T. Haydock Carriage Co. v. Pier*, 74 Wis. 582, it was held "that a married woman is liable on her personal contracts only when they relate to her individual and separate property." In *Reinig v. Hecht*, 58 Wis. 212, the appeal, as here, was from the judgment of foreclosure to reverse a similar order for a personal judgment. It was held "that to justify an order for a personal judgment the personal liability of the defendant must be shown." The power of a married woman to bind herself at law is limited to such contracts and engagements as are necessary or convenient to the use and enjoyment of her separate estate. *Fuller & Fuller Co. v. McHenry*, 83 Wis. 573; *Todd v. Lee*, 15 Wis. 365; *Beard v. Dedolph*, 29 Wis. 136. This principle is too

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well established by our own decisions to be questioned, or to look elsewhere for authorities. The appeal is limited to that part of the judgment of foreclosure which orders the personal judgment against the appellant, *Margaret R. Blewett.* That part of the judgment is clearly erroneous.

By the Court.— That part of the judgment of foreclosure of the circuit court which orders that, if the proceeds of such sale be insufficient to pay the amount aforesaid, a personal judgment be rendered against the defendant *Margaret R. Blewett* for the amount of such deficiency upon the filing and confirmation of the sheriff's report of the sale, is reversed, and the judgment otherwise is affirmed, and the case remanded for further proceedings.

BOURGEOIS, Appellant, vs. THE MUTUAL FIRE INSURANCE COMPANY OF MARSHFIELD, FOND DU LAC COUNTY, WISCONSIN, Respondent.

November 8 — November 28, 1893.

Insurance against fire: Agency: Waiver of conditions.

1. Plaintiff applied to defendant's agent for insurance and truly stated the amount of an incumbrance on his property. At the instance of the agent the defendant's secretary, who was present and who afterwards countersigned the policy, wrote out the application, but falsely stated therein that the incumbrance was for a smaller amount. *Held*, a waiver of a condition in the policy avoiding it in case of any false statement as to incumbrances.
2. Under sec. 1977, R. S., an insurance company which has issued a policy upon an application taken by an agent cannot disclaim his agency in the doing of anything necessarily implied in the taking and forwarding of such application.
3. Where the authority of a local agent is limited to taking applications and receiving premiums, his agency as to a particular policy ceases as soon as the contract is complete, and he has no power thereafter to waive any of the conditions of the policy.

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4. One who becomes a member of a mutual fire insurance company by accepting a policy therein takes it subject to all the conditions and limitations contained therein and in the charter and by-laws, and in the absence of fraud or mistake is conclusively presumed to know their contents.

APPEAL from the Circuit Court for *Fond du Lac* County.

The complaint alleges, in effect, that in June, 1891, for a valuable consideration paid, the plaintiff procured a policy of insurance in the defendant company against loss or damage, to the amount of $3,000, of which $2,000 was on his dwelling house, including foundation and cellar walls, $400 on his barn, $300 on his granary and stable therein, and $300 on live stock, which policy was for the term of five years, from June 4, 1891, to June 4, 1896; that the plaintiff performed all the conditions on his part to be performed; that in the night of February 8 and 9, 1892, the said dwelling house was totally destroyed by fire, for which he prays judgment for $2,000 and interest. The answer is to the effect that the defendant was and is a mutual insurance company; that at the time of issuing the policy in question the plaintiff was a member thereof, and knew of the provisions of the charter, by-laws, and policy; and that, by virtue of certain provisions thereof mentioned, the policy became wholly forfeited prior to said fire, and particularly by the plaintiff's taking $2,000 additional insurance in the Northwestern National Insurance Company in October or December, 1891.

At the close of the trial the jury returned a special verdict, to the effect (1) that the plaintiff's agent, Henry Bourgeois, at the time of the application for the policy in the defendant company, did inform the defendant's agent, Pauley, that there was an incumbrance on the property for $4,900; (2) that the plaintiff's agent, Henry Bourgeois, at the time said application was made, did not represent to the defendant's agent that the property was only incum-

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bered for $1,000; (3) that the plaintiff's dwelling house was worth, when the policy in suit was issued, $7,772; (4) that the plaintiff's agent, Henry Bourgeois, at the time the application for said policy was made, did not represent to the defendant's agent that the plaintiff's dwelling house was worth $6,000; (5) that J. M. Pauley, at the time he took the application for $2,000 in the Northwestern National Insurance Company, in October or December, 1891, did consent to $2,000 additional insurance on the dwelling house in Kelley's agency at Sheboygan; (6) that J. M. Pauley, at the time he took the application for a policy of insurance in the Northwestern National Insurance Company, did state to the plaintiff's agent that it was not necessary to notify insurance companies that additional insurance was to be taken, but all that was necessary was to notify the last company of the prior insurance.

The court denied the plaintiff's motion for judgment on such special verdict, and at the same time granted the defendant's application for judgment thereon. From the judgment entered accordingly the plaintiff appeals.

Maurice McKenna, for the appellant, contended, *inter alia*, that under sec. 1977, R. S., Pauley was the general agent of the defendant and had authority to bind the company by his acts of waiver. *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575; *Knox v. Lycoming F. Ins. Co.* id. 671; *Bosworth v. Merchants' F. Ins. Co.* 80 id. 393; *Mathers v. Union Mut. Acc. Asso.* 78 id. 588; *Zell v. Herman F. M. Ins. Co.* 75 id. 521; *Alexander v. Continental Ins. Co.* 67 id. 422; *Body v. Hartford F. Ins. Co.* 63 id. 157; *Spensley v. Lancashire Ins. Co.* 54 id. 433; *Alkan v. New Hampshire Ins. Co.* 53 id. 136. The company, through Pauley, duly waived the condition requiring notice of additional insurance to be given to the secretary. At all events, having through its agent misled the plaintiff to his injury, it is now estopped from asserting the forfeiture claimed as a defense. This case

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must be distinguished from those (including *Hankins v. Rockford Ins. Co.* 70 Wis. 1) in which it is held that the agent cannot waive a condition in the policy, after its delivery to and acceptance by the assured, where such policy contains an express provision limiting the powers of the agent to waive any of the conditions therein contained. The policy in suit here contains no such provision.

Edward S. Bragg, for the respondent.

CASSODAY, J. The plaintiff, by his agent, applied to Pauley, a local agent of the defendant, for the insurance in question, June 4, 1891. The jury found that at the time of such application the plaintiff's agent informed Pauley that there was then an incumbrance on the property to the amount of $4,900, and the evidence supports the finding. It further appears from the evidence that at the time of such application the plaintiff's agent requested Pauley to write the same; that the defendant's secretary, Hennen, who countersigned the policy in question, being present at the time, at the instance of Pauley wrote the application, and thereupon the plaintiff's agent signed it; that it was therein falsely stated that the property was only incumbered to the amount of $2,000. By the express terms of the policy such false statement would have avoided the same, had not such forfeiture been waived by the facts stated. This court has repeatedly held, in effect, that such action of Pauley and the secretary, with the knowledge of the existence of the incumbrance mentioned, was binding upon the defendant and a waiver of such condition in the policy against such incumbrance. *Renier v. Dwelling House Ins. Co.* 74 Wis. 94, and cases there cited. As there said: "Under our statute, whoever solicits insurance on behalf of any insurance company, or transmits an application to such company, or a policy to or from such corporation, or collects or receives any premium for insurance, or in any

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manner aids or assists in doing either, or in transacting any business for such company, must be deemed and held to be an agent of such corporation, to all intents and purposes, *in each of the several things* mentioned. Sec. 1977, R. S.; *Hankins v. Rockford Ins. Co.* 70 Wis. 4." 74 Wis. 95. The local agent here having been thus applied to for such insurance and informed of such incumbrance, and having procured the application to be written, as mentioned, and the defendant having finally issued the policy thereon, it cannot disclaim Pauley's agency in the doing of anything necessarily implied in the specific acts thus authorized. *Ibid.*

It appears from the findings of the jury that in October or December, 1891, Pauley became or was the local agent of the Northwestern National Insurance Company, and that as such he took the plaintiff's application for $2,000 additional insurance in the last-named company, and that he then informed the plaintiff that it was unnecessary to notify the defendant of such additional insurance. Accordingly, it so happened that the plaintiff took such additional insurance in the Northwestern National Insurance Company without any knowledge or consent of the defendant otherwise than the knowledge so entertained by Pauley. On the night of February 8 and 9, 1892, the property was destroyed by fire. March 14, 1892, the defendant notified the plaintiff that it declined to pay the loss by reason of such additional insurance, and also that the policy was canceled for the same reason. The by-laws of the defendant and the policy in question were, in effect, conditioned that such policy should be void in case the plaintiff should procure any additional insurance during the life of the policy, *provided*, however, that if the assured should, with reasonable diligence, give notice of such additional insurance to the defendant's secretary, and the company should not elect to cancel the policy by reason thereof, then that its liability should continue. Under this condi-

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tion the taking of the additional insurance, as stated, operated *ipso facto* as a forfeiture of the policy, unless the same was waived by the company. The contention is that the defendant, by its agent, Pauley, waived such forfeiture by reason of what he said and did at the time of taking such additional insurance in October or December, 1891, as mentioned. Under the by-laws, Pauley was the agent of the defendant in the town. As such his business was to take applications and receive premiums, either in cash or premium notes, and deliver the same to the company. For each application and each renewal taken by him he was allowed, as a fee, one dollar in case the same was accepted by the company; otherwise, nothing; and no application or renewal so taken was binding on the company until approved by the secretary. Such were his relations to the defendant. While he was the agent of the defendant in procuring the policy here sued upon, yet he ceased to be such agent as to that policy immediately on the completion of that contract. Expressions may be found in some of the adjudications of this court, when not limited by the facts of the particular case being considered and the points decided therein, authorizing a contrary inference; but the authority of a decision is necessarily limited to the points actually decided. This court has repeatedly held that such local agent, under the section of the statute cited, is, after all, limited to the act of the particular person in doing one or more of the things specifically designated therein. This contract of insurance was complete in all its terms and binding upon both parties at the time of the delivery of the policy. The plaintiff, as a member of the defendant company, accepted the policy with all the conditions and limitations contained in the charter, the by-laws, and the policy. In the absence of any fraud or mistake he was, on general principles, conclusively presumed to know their contents. Knowing their contents, the plaintiff must in

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law be deemed to have understood that Pauley, as such mere town agent, had no authority, three months after the making of the contract, to waive the conditions therein contained. *Hankins v. Rockford Ins. Co.* 70 Wis. 4; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198; *Bosworth v. Merchants' F. Ins. Co.* 80 Wis. 393; *Stevens v. Queen Ins. Co.* 81 Wis. 335.

By the Court.— The judgment of the circuit court is affirmed.

RIHA, Appellant, vs. PELNAR, Respondent.

November 8 — November 28, 1893.

Trespass: Evidence: Adverse possession: Estoppel: Mistake in deed: Contradiction of solemn admissions: Reopening of case: Discretion.

1. In an action of trespass, where the defendant claims title to the *locus in quo*, his title deeds are admissible without proof of seisin or possession within twenty years. Having shown his legal title to the premises, he is presumed, under sec. 4210, R. S., "to have been possessed thereof within the time required by law," and the occupancy of other persons is "deemed to have been under and in subordination to the legal title," unless shown to have been adverse.
2. Upon an issue involving title to land, the testimony of one under whom both parties claim, that when he signed the deed of the premises to defendant's grantor he could not read English and supposed that it described a different parcel of land, is not admissible, where there was no claim that the mistake was mutual or that the grantee in such deed knew of the mistake or was guilty of any fraud.
3. Evidence is not admissible to contradict a solemn admission previously made on the trial by the party offering it, and which has not been withdrawn.
4. After a case is closed, the matter of reopening it for further proof rests in the sound discretion of the trial court.
5. The grantor of land is estopped from claiming that his possession after the conveyance was adverse to his grantee.

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APPEAL from the Circuit Court for *Kewaunee* County.

Trespass action, commenced in justice's court and removed to the circuit court upon plea of title. The premises in dispute are a half acre of land in a square form in the N. W. corner of the W. ½ of the N. W. ¼ of section No. 21, township 22, range 24, in Kewaunee county.

It appeared on the trial that one Francis Shimmel was the original owner of the above-described eighty acres, including the half acre in dispute, and that both parties claim title under him. On the 29th day of March, 1864, Francis Shimmel and wife conveyed the said eighty acres, without exception, to Wenzel Shimmel, by warranty deed. January 10, 1872, Wenzel Shimmel and wife conveyed the same premises by warranty deed to John Riha. The plaintiff, *Wenzel Riha*, is one of the heirs at law of said John Riha, deceased, and is the grantee of the premises by quit-claim deed signed by the remaining heirs of John Riha. This series of deeds constituted the plaintiff's paper title.

On the part of the defendant it appeared that Wenzel Shimmel and wife conveyed to Simon Pelnar, October 13, 1859, by warranty deed, the half acre of land in dispute, described as one half acre of land in the N. W. corner of the N. W. ¼ of the N. W. ¼ of said section 21, which deed was duly recorded September 27, 1860; also that on the 12th of January, 1885, Simon Pelnar and wife conveyed the said half acre by warranty deed to the defendant, *Nicholas Pelnar*, which deed was recorded January 24, 1885.

The case was tried with a jury, but after both parties had rested and a motion for nonsuit had been made the jury was discharged by agreement of the counsel, and the case submitted to the court for decision. The case was then reopened and further testimony taken. The court made the following findings:

First. The trespass complained of consists of the admitted attempt of the defendant to build a fence around

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one half acre of land in the N. W. corner of the W. ½ of the N. W. ¼ of section No. 21, described in the complaint. The premises in dispute were conveyed by Wenzel Shimmel and wife to Simon Pelnar by warranty deed dated October 13, 1859, and recorded September 27, 1860, which deed described the premises as one half acre in the northwest corner of the government subdivision given above.

Second. That on the 13th day of October, 1859, the W. ½ of the N. W. ¼ of said section No. 21 was inclosed with a brush fence on the north and west sides, so as to include the one half acre in dispute. That said fence has been repaired, rebuilt, and maintained by Franz Shimmel and his grantees from time to time since 1859, on substantially the same line, and the said W. ½ of the N. W. ¼ of the said section has been protected by a substantial inclosure by the plaintiff and his grantors for more than twenty years next prior to the acts constituting the alleged trespass, and the said fence was built in the year 1859 or before.

Third. That the plaintiff and his grantors have been in the actual, continuous, and exclusive possession of said W. ½ of the N. W. ¼ of said section 21, including said one half acre, from October 13, 1859, down to the time of the alleged trespass, and during that time cleared off the timber from said one half acre, together with other land in said government eighty adjacent thereto, and cultivated and improved the same according to the usual course and custom of the adjoining country; that the defendant and his grantors have never been in actual possession of the premises in dispute.

Fourth. That the defendant and his father, Simon Pelnar, grantee in the deed of October 13, 1859, both lived near said premises, and must have known of the possession of and improvements on said W. ½ of the N. W. ¼ of said section No. 21, including said one half acre, by the plaintiff and his grantors.

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Fifth. That neither the defendant nor his father is shown to have informed or notified the plaintiff or any of the latter's grantors that they claimed title or ownership to the one half acre in dispute; that neither the plaintiff nor any of his grantors ever informed or notified the defendant or his father, Simon Pelnar, that they claimed title or ownership to the said one half acre, or that they claimed to hold the same adversely; that neither the defendant nor his said father had any notice or knowledge that the plaintiff and his grantors were not holding in subordination to the legal title, unless such knowledge can be inferred from the foregoing facts found as to possession; that there has been no disseisin of the defendant or his grantors, or adverse possession of the premises in dispute by the plaintiff or his grantors, unless a disseising or adverse possession can be inferred from the foregoing facts and the testimony of the plaintiff's witnesses as to the nature and character of the possession of the plaintiff and his grantors.

Sixth. That the acts of the defendant complained of were committed by him in digging post holes and setting posts around said one half acre in square form in the N. W. corner of the W. ½ of the N. W. ¼ of said section No. 21, within the inclosure made by said fence originally constructed in 1859.

Seventh. That if the plaintiff is entitled to recover, his damages are found to be the sum of six cents.

The conclusions of law are: (1) That the said deed of October 13, 1859, conveyed one half acre in square form in the N. W. corner of said W. ½ of the N. W. ¼ of said section 21. (2) That the plaintiff and his grantors have held possession of the one half acre in question since the said deed of October 13, 1859, not adversely to the defendant and his father, but in subordination to their legal title. (3) That the plaintiff is not entitled to recover in this ac-

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tion, and that his complaint should be dismissed on the merits, with costs.

From judgment for defendant on these findings the plaintiff appeals.

George B. Byron, attorney, and *G. G. Sedgwick*, of counsel, for the appellant.

For the respondent there was a brief by *John Wattawa*, attorney, and *Nash & Nash*, of counsel, and oral argument by *L. J. Nash*.

WINSLOW, J. The paper title to the half acre in dispute was admittedly in the defendant under the deed of Wenzel Shimmel to Simon Pelnar, of date October 13, 1859. It is equally clear that the actual possession of the premises has been in the plaintiff and his grantors since on and prior to the execution of the Pelnar deed. The circuit court found that this possession was not adverse, but was in subordination to the true title, and consequently that the defendant committed no trespass in entering upon the premises. This question of the nature of the plaintiff's possession, whether adverse or not, is the vital and controlling question in the case. If the circuit court was right in its conclusion that the plaintiff's possession was not adverse, then the judgment was plainly right, unless prejudicial errors in rulings upon evidence occurred on the trial. The contentions made by appellant will be noticed in their order.

1. Appellant claims that it was error to admit in evidence the defendant's title deeds, because defendant had not shown seisin or possession of the premises within twenty years before the committing of the alleged trespass. R. S. sec. 4208. It is true that neither the defendant nor his grantor had actual possession of the premises, but having proved his legal title he is presumed, under R. S. sec. 4210, to have been possessed thereof within the time re-

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quired by law, and the occupancy of other persons is deemed to be in subordination to the legal title, unless it was adverse. *Allen v. Allen*, 58 Wis. 202. That is, the plaintiff's possession was in legal effect possession by defendant so long as it was not adverse. The court below decided — rightly, as we shall see — that plaintiff's possession never became adverse, therefore this objection is not well taken.

2. The appellant offered to prove upon the trial, by Wenzel Shimmel, that when he signed the deed of the premises in suit to Simon Pelnar he could not read the English language, and that he did not know that the deed described the premises in controversy, but supposed that it conveyed a strip of land one rod wide along the north side of the eighty acres, and that he intended to convey such strip. It was not claimed that the mistake was mutual, nor that Pelnar knew of such mistake, nor that there was any fraud; in fact it was admitted by plaintiff that he could not prove what Pelnar thought or did not think, nor what was said. This evidence was rightly excluded. The deed was duly executed in proper legal form, and was not ambiguous or uncertain in any respect. It conveyed a half acre of land in a square form in the northwest corner of the eighty-acre tract. *Dolan v. Trelevan*, 31 Wis. 147. Such testimony would contradict the words of the grant, not explain its meaning. *Lego v. Medley*, 79 Wis. 211. The evidence offered would plainly not be sufficient to impeach or set aside the deed, because it was not claimed that there was any mutual mistake, or that the grantee knew of any mistake or different intention by the grantor from that expressed in the deed, or practiced any fraud, imposition, or concealment upon the grantor in any respect. So far as the evidence offered tended to prove anything, it was simply a concealed intention in the grantor's mind, not known to the grantee, and inconsistent with the expressed agreement

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of the parties. Such a mistake will not relieve a party from a contract. Kerr, Fraud & M. 409.

3. The plaintiff claimed title by adverse possession, both under the ten-year and twenty-year sections of the statute. He offered to show that after the execution of the deed of October 13, 1859, by Shimmel to Pelnar, Shimmel moved back his fence one rod along the north line of his land, and gave possession of this strip to Pelnar. He claims that this evidence was proper as tending to show that the plaintiff's possession of the half acre in the corner was adverse. This may be conceded, but still the evidence was properly excluded, by reason of facts occurring on the trial, now to be stated. During the course of the trial, and prior to this offer, it was admitted by both parties, and the admission was taken down by the reporter, that the fence was built along the north line of the eighty-acre tract in 1858, and remained in the old place, being repaired from time to time, until supplanted by a wire fence two years before the trial. This solemn admission had not been withdrawn when the testimony was offered. Later in the case the plaintiff asked to withdraw the admission that the fence was built in 1858, and the court allowed him to call Shimmel to testify that it was built about twenty-five years ago; but that part of the admission to the effect that the fence remained in the old place until two years ago, was never withdrawn, nor offered to be withdrawn, and still remains a verity in the case.

4. After the case was closed, the jury was excused by agreement of counsel, and the case submitted to the court for decision. At this time, on plaintiff's application, further testimony was taken on the subject of the time when the north fence was built. The plaintiff introduced one witness on this subject, and the defendant one witness in addition to himself, and rested a second time. The plaintiff thereupon proposed to read the deposition of defendant

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taken before trial under sec. 4096, R. S., claiming that it contradicted some of his evidence given in court. An objection to thus reopening the case was sustained, and we think very properly. The matter of reopening the case for further proof rested in the sound discretion of the circuit court. It was not a matter of strict right, and the court seems to have allowed plaintiff much latitude in the matter,—fully as much as could be reasonably asked or allowed.

5. The court found that the plaintiff's possession of the premises was in subordination to the true title, and consequently not adverse. In thus holding the court undoubtedly followed the case of *Schwallback v. C., M. & St. P. R. Co.* 69 Wis. 292. Following the rule in the *Schwallback Case*, it must be held that after Shimmel's conveyance to Pelnar he was estopped from claiming that his possession was adverse to his grantee. His possession and that of his grantees must be "deemed to have been in subordination to the legal title." The proof of adverse possession in this case was no stronger than that in the *Schwallback Case*, and the decision in that case must govern here. See, also, on this point, *McCormick v. Herndon*, *post*, p. 449.

Some contention was made as to the finding of fact made by the circuit court as to the time when the north fence was built, but an examination of the case shows that the finding was justified by the evidence. No further points require attention.

By the Court.— Judgment affirmed.

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KUCERA, imp., Respondent, vs. KUCERA and wife, Appellants.

November 9 — November 28, 1893.

Demurrer: Misjoinder of plaintiffs.

The question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against the defendants, cannot be raised by demurrer, under sec. 2649, R. S.

APPEAL from the Circuit Court for *Kewaunee* County.

This action was brought to redeem the premises described in the complaint from a mortgage thereon held by the defendants. It appears from the complaint that the defendant *John Kucera*, on the 3d of January, 1891, was the owner in fee of the premises, and he conveyed the same (his wife joining in the deed) to their son, Joseph Kucera, and his wife, Mary, and at the same time took back from them a bond in the sum of $1,500, conditioned for the maintenance of the defendants, *John Kucera* and his wife, *Josephine*, during their natural lives and life of the survivor of them, and this bond was secured on the premises by said mortgage to the defendants. On the 7th day of April, 1892, their son, Joseph, one of the grantees in said deed, died intestate, his wife, Mary Kucera, the other grantee, and their infant daughter, *Mollie*, one of the plaintiffs in this action, surviving him; and afterwards, July 21, 1892, the said Mary Kucera deeded said premises to her father, *John Srnka*, who is the other plaintiff in the action. The plaintiffs allege that they are now the owners in fee of the premises, and that they had tendered to the defendants the amount secured by the bond and mortgage, and are now ready to pay the money into court, etc.

The defendants made answer to the complaint as to the plaintiff *John Srnka*, and as to the plaintiff *Mollie Kucera*

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they demurred thereto, "in so far as it relates to or attempts to state a cause of action in favor of the plaintiff *Mollie Kucera* and against these defendants, for the reason that it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action in favor of said *Mollie Kucera* against the defendants." The defendants appealed from an order overruling the demurrer.

Geo. B. Byron, for the appellants.

For the respondent there was a brief by *John Wattawa*, attorney, and *Nash & Nash*, of counsel, and oral argument by *L. J. Nash.*

PINNEY, J. The demurrer in this case is of a somewhat anomalous character, and presents the question whether, where an action is brought by two or more plaintiffs, the defendant may demur to the complaint in so far as it relates to one of the plaintiffs only, for the reason that it does not state facts sufficient to constitute a cause of action in favor of such plaintiff and against the defendants, it being conceded that the complaint does state facts sufficient to warrant a recovery in favor of the other plaintiff.

The ground of demurrer specified by subd. 6, sec. 2649, R. S., "that the complaint does not state facts sufficient to constitute a cause of action," must, as in other cases, be specified "in the language of the subdivision of sec. 2649 relied upon." A demurrer so limited and qualified as this does not seem to be allowed by the statute, but had it been in the general language of subd. 6, under repeated decisions of this court from which we see no reason to depart, it must have been overruled. The objection is, in substance, that there is a misjoinder or excess of parties plaintiff. The statute does not permit a demurrer upon the ground that there is a misjoinder of parties plaintiff or defendant. This is not a defect of parties, within subd. 4, sec. 2649.

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Misjoinder and excess or superfluity of parties are identical. *Read v. Sang*, 21 Wis. 678. That a misjoinder or excess of parties defendant is not the ground of demurrer has been expressly ruled in *Great Western Compound Co. v. Ætna Ins. Co.* 40 Wis. 373; *Murray v. McGarigle*, 69 Wis. 484. But the defendants so improperly joined may demur separately on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Arzbacher v. Mayer*, 53 Wis. 380. In *Read v. Sang*, 21 Wis. 678, it was held that the objection that the wife had been improperly joined as a plaintiff with her husband in an action in which the entire interest was in him was allowed for the peculiar reason that no judgment could be given in favor of the defendant in such case against the wife. In *Willard v. Reas*, 26 Wis. 540, it was held that a demurrer for excess of parties plaintiff is bad if one of them is entitled to judgment against the defendant; and *Marsh v. Waupaca Co.* 38 Wis. 250, is to the same point. In *Schiffer v. Eau Claire*, 51 Wis. 385, 393, a demurrer by a defendant to the complaint on the ground that, as to one of the plaintiffs, it did not state facts sufficient to constitute a cause of action, was overruled. And in *Boyd v. Beaudin*, 54 Wis. 194, it was held that the joinder of a plaintiff who has no interest is not a ground of demurrer. In *Nevil v. Clifford*, 55 Wis. 161, 166, it was held that, under a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, the fact that there is a misjoinder of parties plaintiff cannot be considered. It is therefore well settled in this state that a demurrer on this ground cannot be allowed.

The case of *Palmer v. Davis*, 28 N. Y. 247, is cited as justifying the demurrer in question, and that conclusion is sustained by the subsequent case of *People ex rel. Lord v. Crooks*, 53 N. Y. 648. These cases, while holding that a misjoinder of parties plaintiff is not a ground of demurrer, hold that any

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special demurrer, such as this is in fact, may be sustained on the ground that the complaint does not, *as to one of the plaintiffs*, state a cause of action, and that the objection may also be raised at the trial, when the complaint will be dismissed as to such plaintiff, but that it will be no ground for dismissal of the complaint as to both plaintiffs. It is worthy of notice that the amended or new Code in New York, adopted since these cases were decided (sec. 488), has specified as a distinct ground of demurrer "that there is a misjoinder of parties plaintiff or defendant." As the defendants can avail themselves of the objection to its full extent at the trial, and there can be but one final judgment in the action, the right to have the objection allowed on demurrer cannot be a matter of much practical advantage or importance, and at best could result only in an order that could not be carried into effect until after a trial as to the other plaintiff. We will adhere to the rule as already settled until, as in New York, the legislature shall change it. If the complaint states a good cause of action in favor of *Mollie Kucera*, it is not denied but that the demurrer was properly overruled. If it does not state facts sufficient to constitute a cause of action in her favor as against them, it is difficult to see how the defendants can be prejudiced, or said to have been aggrieved, by the order appealed from.

It must therefore be regarded as settled, in this state at least, that the question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against the defendants, cannot be raised by demurrer, under any of the grounds allowed by sec. 2649, R. S. For these reasons the order of the circuit court must be affirmed, and the cause remanded for further proceedings according to law.

By the Court.— It is ordered accordingly.

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SAWVEL, Respondent, vs. BITTERLEE, Appellant.

November 9 — November 28, 1893.

Verdict: Misconduct of jury: Separation.

A jury having retired with leave, if they agreed upon a verdict, to seal it and separate, sealed a pretended verdict to the effect that they agreed to disagree, and separated. *Held*, that this was a wilful violation of duty, involving falsehood and fraud, and was of such a character as to impeach the motives of the jurors and the integrity of a verdict in favor of one of the parties returned by them after they had reassembled on the next day and the cause had been resubmitted to them; and a judgment based on the latter verdict cannot be upheld.

APPEAL from the Circuit Court for *Crawford* County.

Plaintiff was driving his team of horses across the Mississippi river in the night time, and the horses fell into a hole in the ice cut by the defendant and left unfenced and unguarded. One horse was drowned, and the other had his leg broken and was necessarily killed. This action is to recover the value of the horses. The plaintiff had a verdict for such value. A motion for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. Defendant appeals from the judgment.

For the appellant there were briefs by *Thomas & Fuller*, and oral argument by *O. B. Thomas.*

For the respondent there was a brief by *Wm. H. & J. P. Evans*, and oral argument by *J. P. Evans.* To the point that a verdict will not be set aside for mere separation of the jury in a civil action, unless it appears that there is a strong probability that they have been tampered with or influenced to return the verdict sought to be set aside, or that such conduct was occasioned by the prevailing party, they cited *Jackson v. Smith*, 21 Wis. 26; *Dozenback v. Raymer*, 13 Colo. 451; *Downer v. Baxter*, 30 Vt. 467.

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LYON, C. J. The question of the liability of defendant for the loss of plaintiff's horses was a fairly debatable one on the trial, and numerous errors going to the merits of the action are alleged as grounds for reversing the judgment. None of these will be determined on this appeal, for the reason that on the trial an error was committed which is necessarily fatal to the judgment.

The case was submitted to the jury, and they retired in charge of an officer, with leave, if they agreed upon a verdict after court adjourned for the night, to seal their verdict and separate, and they were directed to bring in such verdict at the opening of the court the next morning. They separated at about 8 o'clock in the evening, and each juror went about his business. At 8:30 the next morning they assembled in court, and returned what purported to be a sealed verdict. This verdict was found to be as follows: "We fail to find for or against plaintiff or defendant. Therefore we have agreed to disagree." The court seemed to consider this gross violation of its instructions to them, and of their duty as jurors, which was also a flagrant contempt of the authority of the court, as a harmless joke, although perhaps rather a stale one; and so, instead of punishing them for their misconduct, or even reprimanding them, the court, against the objection and exception of defendant, resubmitted the case to them on further instructions, and said in doing so: "I think, from what I have seen of your faces, that you are just as competent to determine this case as any other jury we are likely to get." So the jury again retired to deliberate, and afterwards brought in the verdict for plaintiff upon which the judgment herein was rendered.

The law does not uphold any such practice as was adopted in this case, and it cannot be tolerated for a moment. Nor can a judgment be upheld, rendered upon a verdict returned

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by a jury guilty of such gross misconduct. On this proposition there seems to be no conflict of authority, and it would be surprising were there any such conflict. In *Shepherd v. Baylor*, 5 N. J. Law, 827, the jurors, after retiring to consider of their verdict, left the room forcibly and against the will of the officer in charge of them, and separated. Afterwards they were gotten together and returned a verdict. The supreme court reversed a judgment upon such verdict, saying of the conduct of the jurors, "It is such a deviation from duty, decency, and order as to impeach the motives, as well as the verdict, of any jury." The conduct of the jurors in the New Jersey case was less reprehensible than that of the jurors in this case, for here the jury separated on the false and fraudulent pretense that they had agreed upon a verdict when they had not. It were more honorable had they separated by brute force, without false pretense, as did the New Jersey jury.

In *Short v. West*, 30 Ind. 367, the jury had leave to return a sealed verdict. Late at night they sealed what purported to be a verdict, and the officer in charge of them allowed them to separate, believing they had agreed upon a verdict. Such alleged verdict was in fact that the jury had agreed to disagree. The jurors reassembled the next morning, destroyed the bogus verdict, and in its place substituted a verdict for one of the parties and returned the same to the court as the sealed verdict in the case, and judgment was rendered in accordance therewith. The supreme court of Indiana reversed such judgment, saying that the resort of the jury to misrepresentation to secure their separation exposes them to reasonable suspicion. True, there is a statute in Indiana which provides that the court may grant a new trial for either of many specified causes, one of which is "when the jury have separated without leave of the court after retiring to deliberate upon their verdict." But this

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statute is merely declaratory of the common law, and the judgment in the Indiana case is rested upon common-law rules as well as upon the statute.

The common-law rule is thus stated by Chief Justice SHAW in *Comm. v. Roby*, 12 Pick. 496: "The result of the authorities is that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshments have been furnished by a party, or where the jury have been exposed to the effect of such influence, *as where they have improperly separated themselves*, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done." Page 519.

In *Jackson v. Smith*, 21 Wis. 26, it is said the ancient rule on this subject has been relaxed. The modern rule is there stated as follows: "The weight of authority now is to the effect that in civil cases, if such improper conduct does not appear to have been occasioned by the prevailing party or any one in his behalf, and the court cannot see that it had or might have an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside." In that case the misconduct complained of was that during the trial one of the jurors expressed to a stranger to the action an opinion as to the credibility of certain witnesses, and said that the testimony of one of the parties looked dark. It was held that, within the rule stated by the court, the misconduct of the juror was not fatal to the judgment; that is to say, under the facts of that particular case, the court could not see that the misconduct of the juror "had or might have an effect unfavorable to the party moving for a new trial." Under the facts of the present case, the

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court can see that the misconduct complained of was a wilful violation of duty by all the jurors, involving falsehood and fraud, and, as already suggested, is of such a character that it impeaches the motives of the jurors and the integrity of their verdict. As applied to this case, the rule laid down by Chief Justice SHAW in 12 Pick. is still in force, and the verdict and judgment cannot be upheld.

Thus far, we have considered the case just as it appeared to the circuit court when it was submitted to the jury after the jurors had thus unlawfully separated. But, on the hearing of the motion for a new trial, certain affidavits were read, to the effect that the case excited much interest in the city of Prairie du Chien where it was tried, and during the morning after the jury had thus separated, and before they assembled in court (as one of the affiants deposed), several of the jurors were in various saloons, drinking, and one of them had a conversation with a person not a juror, in the presence and hearing of plaintiff, who was in the same saloon, and the affiant says that from what he casually heard he thinks all these jurors were talking about the case, and that an effort was being made to prejudice the juror who was thus talking in presence of the plaintiff against defendant. There is no denial of the facts or inferences thus stated. The effect of these undisputed affidavits is to strengthen the impeachment of the motives of the jurors and the integrity of the verdict.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

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VERGERONT, Respondent, vs. THE GERMAN INSURANCE COMPANY, Appellant.

November 9 — November 28, 1893.

Insurance against fire: Proofs of loss: Waiver of objections: Over-estimate by insured: Fraud.

1. All objections to the proofs of loss furnished by the insured are waived by the company keeping them without complaining of any defect or objecting to payment at the time.
2. An over-estimate by the insured of the value of his property and the amount of the loss, if unintentional and with no purpose of defrauding the company, will not preclude a recovery for the loss.

APPEAL from the Circuit Court for *Richland* County.

Action upon a policy by which plaintiff's stock of goods was insured against loss by fire to the amount of $1,000. The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

L. H. Bancroft, for the appellant.

F. W. Burnham, for the respondent.

ORTON, J. This action was brought by the respondent on a policy of insurance issued by the appellant company on the 12th day of February, 1891, on a stock of general merchandise within a store building in the village of Cazenovia, in Richland county, the property of the plaintiff. The said stock of goods, and the building containing them, were burned on the 7th day of March, 1891, and were a total loss. The policy was negotiated on behalf of the company by their local agents at Richland Center, Pease, Bros. & Co., one of which firm was one Homer Clark. The value of the goods was represented in the application for insurance to be $3,384, and the plaintiff testified as a witness that the value of the goods burned was from $2,500 to $3,000; and the verdict finds the value of the goods lost to have been

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$2,800, and the plaintiff's damages to be $1,000 and interest. The only questions raised on this appeal are those of fact, and no error of law is assigned. The contention of the learned counsel of the appellant is that special findings of fact by the jury are not sustained by the evidence. The points made in appellant's brief will be considered in their order:

1. That the plaintiff did not furnish to the company the proofs of loss as required by the policy. On that question the said Homer Clark, agent, testified, in effect, that the plaintiff brought into his office some bills, and he footed a part of them and sent them to the company, and he also sent to the company a typewritten blank of the company, filled out and signed by the plaintiff, as the proof of loss. A statement, copy of affidavit, and other papers, stating the amount of the loss, were also sent by him to the company. The witness, having refreshed his memory, testified that the printed proof of loss, copy of invoice, and affidavit of its correctness, attached, were made out and found to be correct by Mr. Hoebgin, the general agent at Milwaukee, and sent to the company. Mr. Hoebgin testified that he prepared a regular form, called "proof of loss," and an affidavit, except the jurat, and they were sent to the company, and then said, "We make no point on that." The plaintiff was also sworn before a justice, and fully examined by the agents in respect to his loss. The company kept, and never returned, these proofs of loss sent to it, and never complained of the want of them or any deficiency in them, and never made that an objection to payment at the time. Under such circumstances the proofs of loss were sufficient, and the company waived all objection to them. *Killips v. Putnam F. Ins. Co.* 28 Wis. 472; *Badger v. Phœnix Ins. Co.* 49 Wis. 396.

2. That the plaintiff overestimated the value of the property insured and the amount of his loss. That is very

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much a mere matter of opinion, upon which persons might well differ. The plaintiff testified that such was the value of the property insured, and the value of the goods burned was from $2,500 to $3,000, and the jury found such value at $2,800. Other witnesses disagreed with the plaintiff as to such values. But there was clearly no intention of the plaintiff to overestimate such values, or to defraud the company. *Dogge v. N. W. Nat. Ins. Co.* 49 Wis. 501.

3. There were more powder and inflammable oils in the building than represented or allowed. The testimony of other witnesses as to the amount of these articles kept in the store was fully explained by the plaintiff, and the fact reiterated by him that there never was at one time more of those articles than the policy allowed kept in the building. The jury had the right to believe the plaintiff, as they evidently did.

These are all the points specifically made in the appellant's brief. We have examined the testimony sufficiently to be satisfied that the special verdict and findings of the jury are sustained by it.

By the Court.— The judgment of the circuit court is affirmed.

FOWLER and another, Appellants, vs. MCCANN, Respondent.

November 9 — November 28, 1893.

Deceit.

False representations which were not relied upon are not actionable.

APPEAL from the Circuit Court for *Richland* County.

The complaint alleges that on December 24, 1889, the plaintiffs were the owners of the eighty acres of land described and known as "Horse Creek Farm," and conveyed

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to and exchanged the same with the defendant, at an agreed price of $1,800, for a house and lot in Richland Center, at an agreed valuation of $500, and cash to the amount of $300; and in lieu of the balance of said consideration the plaintiffs were induced by the defendant to accept a promissory note executed by Louis and Mary Roque to the defendant or his order for $1,000, dated November 23, 1888, secured by mortgage on eighty acres of land described and known as the "Mill Creek Farm;" that to induce the plaintiffs to accept said note and mortgage the defendant fraudulently represented to the plaintiffs that the premises covered by the mortgage were worth $2,600; that one acre thereof was worth more than two acres of the land plaintiffs conveyed to the defendant; that the land was worth more than any eighty acres of land on Horse creek; that all of it was good farming land, suitable for and capable of cultivation; that it lay in the valley of Mill creek; that forty acres of the same were cleared; that in the season of 1889 Roque raised eighteen acres of good corn thereon; that the uncleared land was thickly covered with extra fine and valuable timber; that much of the timber was tie timber; that there was enough timber on the place to pay off the mortgage; that there was a large and good log house on the premises, clapboarded on the outside and lathed and plastered on the inside; that there was a large and good log double barn on the premises; that there were good corncribs, a good pigpen, and other outbuildings on the premises, all sufficient for the needs and requirements of the place. It is alleged that all of said representations were untrue and false, and so known to be at the time they were made. Plaintiffs claim $1,000 damages and interest. The answer consists of admissions, denials, and counter allegations.

At the close of the trial the jury returned a special verdict, to the effect: (1) That the Roque mortgage was

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transferred by the defendant to the plaintiffs in the trade between them at the price of $1,000. (2) That the defendant did not represent to the plaintiffs, before said trade was consummated, that the eighty acres of land near Mill creek, covered by the mortgage, was good farming land, and that all of it, when cleared, could be cultivated; (3) nor that said mortgaged land was good farming land and was worth more than any two eighties of land on Horse creek; (4) nor that said Mill creek farm was well timbered, and that the timber upon it was of sufficient value to pay off said mortgage; (5) nor that Roque had built upon said mortgaged premises a substantial hewed log house that was lathed and plastered. (6, 7) That the defendant did then represent to the plaintiffs that forty acres of said Mill creek farm were cleared, and (8, 9) that the Mill creek farm was worth $2,600. (10) That such representations were false. (11) That the defendant had been upon said Mill creek farm before he assigned the mortgage thereon to the plaintiff, and knew the character of the same and the improvements thereon. (12, 13) That the Mill creek farm was not good farming land, and could not, any more than forty acres of it, be cleared and cultivated. (14) That this Mill creek eighty was poor farming land, (15) and was poorly timbered in December, 1889. (16) That the marketable value of the timber thereon was $175. (17) That the mortgagor, Roque, had not built thereon a substantial hewed log house that was lathed and plastered, (18) but only a fair log house, hewed on inside. (19) That only thirty acres of said land were cleared at that time. (20) That the value of said mortgaged land at the time was $1,130. (21) That the defendant knew that such representations were false at the time he made them. (22) That the plaintiffs did not believe said false representations made by the defendant to be true; that they were not deceived by them; that they did not rely upon them in taking this Roque

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mortgage, and they were not induced by such representations to take said mortgage. (23) That the plaintiffs, or either of them, did not know this Mill creek land at the time said mortgage was transferred to them. (24) That said mortgage would have been worth at the time the defendant transferred it to the plaintiffs, if the representations found to be false had been true, the sum of $1,000. (25) That said mortgage was worth, at the time the defendant transferred it to the plaintiffs, $700.

The court denied the plaintiffs' motion to set aside the special verdict and for a new trial, and also denied their motion for judgment on the special verdict; and thereupon the court granted the defendant's motion for judgment, and the same was entered accordingly. From that judgment the plaintiffs appeal.

Michael Murphy, of counsel, for the appellants.

For the respondent there was a brief by *Eastland & Son*, attorneys, and *John D. Wilson*, of counsel, and oral argument by *Mr. Wilson*.

Cassoday, J. It appears from the special verdict set forth in the foregoing statement that the defendant represented to the plaintiffs that forty acres of the Mill creek farm were cleared, when as a matter of fact there were only thirty acres of the same cleared; that that farm was worth $2,600, when as a matter of fact it was only of the value of $1,130; that the defendant knew such misrepresentations to be false at the time he made the same; that, had such representations been true, the mortgage would have been worth $1,000; that as a matter of fact it was only worth $700 at the time of the transfer. Such are the only false representations found by the jury. Had the plaintiffs been induced to make the trade or exchange by reason of such false representations, then, under such findings, the plaintiffs would have been entitled to a judgment

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for $300. But the jury expressly find that the plaintiffs were not so induced. The twenty-second finding is to the effect that the plaintiffs did not believe such false representations to be true, and were not deceived thereby, and did not rely upon them in making the trade, and were not induced by them to take the mortgage. The evidence is sufficient to sustain this finding, and we do not perceive that this finding is inconsistent with the other findings in the case. It is well settled that a mere expression of an opinion as to the value of land to be exchanged for other land will not amount to a fraudulent representation. *Maltby v. Austin*, 65 Wis. 527; *Gordon v. Butler*, 105 U. S. 553; *Homer v. Perkins*, 124 Mass. 431. The misrepresentations made, however, were something more than a mere expression of opinion as to the value of the mortgaged premises. But, in order to render a misrepresentation an actionable fraud in any case, it must, among other things, be relied upon by the person to whom it is made, or whose action it is intended to influence. *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Craig v. Hamilton*, 118 Ind. 565; *Whiting v. Hill*, 23 Mich. 399. This principle is elementary. 8 Am. & Eng. Ency. of Law, 636, 637, and cases there cited. Here, according to the verdict, the plaintiffs did not rely upon the false representations made; and hence they have not been damaged thereby and of course cannot recover.

By the Court.—The judgment of the circuit court is affirmed.

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KELLY, Respondent, vs. THE TOWN OF DARLINGTON, Appellant.

November 9 — November 28, 1893.

Pleading: Injury from defective bridge: Proximate cause.

A complaint which, after describing certain alleged defects in a bridge, states that "by reason, entirely, of the insufficiency, want of repair, and defects aforesaid, of and in said bridge," a wagon in which plaintiff was riding was precipitated therefrom, causing serious injuries to her, sufficiently alleges that the defects were the proximate cause of the injury.

APPEAL from the Circuit Court for *La Fayette* County.

Action for personal injuries resulting from falling from an alleged defective bridge upon a highway in the defendant town. The complaint charged, in substance, that the bridge was too narrow to be safely traveled, was dangerously high, being about twelve feet above the river bed, and was without guards or railings; that by reason of said defects, and without fault on the part of the plaintiff or driver, a team of horses and the wagon attached, in which wagon plaintiff was riding, were precipitated off of said bridge into the stream, causing serious injuries to the plaintiff. The complaint also alleges the timely giving of the notice required by sec. 1339, R. S., and the filing of a claim as required by sec. 824, R. S.; and a copy of said notice and claim, which are identical, is attached to the complaint as an exhibit. Said notice describes and locates the bridge with exactness; alleges, as defects, that there were no guards or rails thereon, that it was too narrow, and that it was unnecessarily and dangerously high, being about twelve feet above the bed of the water; and alleges that plaintiff received her injuries by reason of said defects in the bridge. The complaint also contains allegations showing the rejection of the claim by the town board of

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audit before suit brought. A general demurrer to the complaint was overruled, and defendant appeals.

For the appellant there was a brief by *Orton & Osborn*, and oral argument by *P. A. Orton.*

For the respondent there was a brief by *Wilson & Martin*, and oral argument by *R. J. Wilson.*

WINSLOW, J. Why this demurrer should have been interposed is not apparent. It is manifest that it was rightly overruled. It is said that the defects in the bridge are not alleged to be the proximate cause of the injury. The complaint distinctly alleges that "by reason, entirely, of the insufficiency, want of repair, and defects aforesaid, of and in said bridge," said team fell from the bridge. Nothing further seems necessary.

By the Court.— Order affirmed.

OHLERT, Respondent, vs. ALDERSON and others, Appellants.

November 10 — November 28, 1893.

Contracts: Sale of land: Parol evidence as to consideration, etc.

A written contract of sale and the deed given in execution thereof described specifically two government subdivisions of land and stated the consideration as a gross sum, without mention of the number of acres sold or of any price per acre. *Held*, that in the absence of fraud or mistake parol evidence was inadmissible to show that the agreement was for the sale of a certain number of acres or for a certain price per acre.

APPEAL from the Circuit Court for *Grant* County.

This is an action for money had and received, based upon the following facts, in substance, namely:

The defendants entered into a written contract October 21, 1889, to sell and convey to the plaintiff "the south half

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of southwest quarter of section 36, town 6, range 4, and the north half of northwest quarter of section 1, town 5, range 4, in Grant county, Wisconsin," for the sum of $4,000, to be paid as specified in the contract. There was no mention in the contract of the number of acres sold, or of any price per acre. It simply mentions, in express terms, the sale of the said two government descriptions of land for $4,000, without other explanation or qualification. Subsequently, the $4,000 consideration having been paid, the defendants executed and delivered to the plaintiff a warranty deed of said tracts. The deed expresses a consideration of $4,000, and the premises thereby conveyed are described therein as follows, namely: "The following described real estate, situate in the county of Grant and state of Wisconsin, to wit, the south half of the southwest quarter of section 36, town 6, range 4 west; also, north half of northwest quarter of section 1, town 5 north, of range 4 west." The plaintiff subsequently had the tracts of land thus described surveyed, and ascertained for the first time that they contained 154.1 acres of land, and no more. He then claimed that he bought these tracts of land for 160 acres of land, at $25 per acre, and that the defendants told him at the time, in substance, that there were 160 acres in the two tracts; and he demanded that the defendants repay him the price of 5.9 acres at the rate of $25 per acre, $147.50, and brought this action for the recovery of that sum, with interest. There was no claim that there was any fraudulent representation made by the defendants as to the quantity of land included in the two tracts, and it appeared that before making the purchase the plaintiff examined the lands and had an opportunity to ascertain the contents of the tracts.

At the trial the court, against the objection of defendants, permitted the plaintiff to produce and give parol evidence to the effect that by the parol agreement which preceded the written contract it was agreed and understood that the

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defendants were to sell and convey the tracts of land in question, and that they contained 160 acres of land, for which plaintiff was to pay $25 per acre, amounting to $4,000. Evidence was given on behalf of the defendants tending to show that the lands in question were sold by defendants for $4,000; that the defendants did not know what number of acres the tracts contained until after the plaintiff had them surveyed, but supposed that they contained 160 acres of land; and that when the deed was delivered nothing was said as to the number of acres they contained.

The conflict between the claims of the respective parties was whether the sale was of certain tracts of land supposed to contain 160 acres at a lump sum for the tracts, or whether it was, on the contrary, the sale of 160 acres of land at $25 per acre, the amount of the purchase price to be determined by the number of acres in the tracts. There was no claim made that any fraud or mutual mistake occurred in the execution of the contract of sale, or the execution and delivery and acceptance of the deed, as to the terms of the sale. The court, at the request of plaintiff's counsel, instructed the jury "that if the plaintiff bought, and the defendants sold to him, a given number of acres at a given price per acre, and not a lump contract for a lump sum, and the land conveyed by them to him does not contain so many acres as he bought and they sold, and he has paid them for the number of acres bought by him, the plaintiff is entitled to recover from the defendants the difference between the number of acres he bought and the number conveyed to him by them, at the agreed price per acre." The court was requested, on behalf of defendants, to instruct the jury, in substance, that when a contract is put into writing it extinguishes any previous parol agreement between the parties as to the terms of the contract, and, if there is no ambiguity or uncertainty on the face of

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the writing, it is binding upon the parties and cannot be varied or changed by parol evidence unless it appears that fraud was used by one party to induce the other to assent thereto. The court refused to so instruct the jury.

The plaintiff had a verdict for $150, upon which judgment was entered. The defendants appealed.

For the appellants there was a brief by *Bushnell & Watkins* and *John D. Wilson*, and oral argument by *A. R. Bushnell* and *R. A. Watkins*.

For the respondent there was a brief by *Carter & Burns*, and oral argument by *W. E. Carter*. They contended, *inter alia*, that the parol evidence in this case did not tend to vary or contradict the terms of the written instruments, but only to complete them in the particular respecting which they were incomplete; that is, as to how the consideration stated in them was arrived at. Both the statement of consideration in a deed and the recitals of its payment may be varied and controlled by parol evidence. *Cardinal v. Hadley*, 158 Mass. 352; 5 Am. & Eng. Ency. of Law, 436–7; *Reynolds v. Vilas*, 8 Wis. 482; *Bird v. Kleiner*, 41 id. 134; *Frey v. Vanderhoof*, 15 id. 397, 401; *Hahn v. Doolittle*, 18 id. 196; *Hubbard v. Marshall*, 50 id. 322; *Red Wing Mfg. Co. v. Moe*, 62 id. 240; *Becker v. Knudson*, 86 id. 14; *Barnes v. U. P. R. Co.* 54 Fed. Rep. 87; *Tarbell v. Bowman*, 103 Mass. 341; *Pickman v. Trinity Church*, 123 id. 1; *Paige v. Sherman*, 6 Gray, 511.

PINNEY, J. The plaintiff's right to recover in this case depends entirely upon whether, as against the express and unambiguous terms of the contract of sale and the deed of conveyance executed to carry it into effect, he can be allowed to show by parol evidence that the contract was for the purchase and conveyance of 160 acres of land, and not merely the tracts specifically described, and consequently the quantity of land only which these tracts might contain,

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for the price and sum of $4,000. We consider the law on this subject very plain, and cannot understand how the plaintiff's recovery can be sustained. By the plain and unambiguous terms of the written contract, the plaintiff purchased only the tracts of land in question, and consequently only the quantity of land they contained, for $4,000. Neither the contract nor the deed makes any mention whatever of the quantity of land. The parol evidence admitted contradicted and varied the terms both of the contract and deed in very important respects, namely, in respect to the quantity of land sold and in respect to the consideration which was to be paid therefor. The evidence goes to show that the defendants agreed to sell, and the plaintiff bought, not merely the two tracts of land specifically described in the contract and deed, but as containing 160 acres of land, and to show that the price and consideration to be paid for them was not $4,000, as stated in the contract, but $147.50 less than that sum. Bearing in mind that there is no allegation of fraud or mistake in the complaint, it seems hardly possible to state propositions more clearly at variance with the rule forbidding the admission of parol evidence to contradict or vary the terms of a written contract, or more destructive of the sanctity of written instruments. Had it been ascertained upon a survey that the tracts contained a like quantity of land in excess of 160 acres, upon the grounds upon which this recovery has been allowed the defendants might sue and recover from the plaintiff a like sum in excess of $4,000, although the contract, plainly, is that the plaintiff was to have all the land that both tracts contained, and only that, for only $4,000. We think the statement of the plaintiff's contention is its sufficient refutation.

The contract and deed clearly state a sale and conveyance of what may be aptly termed as a "lump quantity" for a definite gross sum, and, as there was no allegation of

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fraud or mistake, parol evidence to the contrary was certainly inadmissible; and it is wholly immaterial how the parties arrived at the sum to be paid, or whether there was any discussion or understanding as to the quantity of the land. All these matters are merged in the written instruments, and their language is decisive and final. The fact that parol evidence is admissible, in an action on the covenants of a deed, to show and explain the consideration clause and what the real consideration was, as the measure of damages, or how the consideration was to be paid, or that the deed was made upon a valuable consideration and so was not fraudulent as against creditors or subsequent purchasers, or to prove by parol other facts than those stated in a deed, in order to show the whole transaction, when they are not inconsistent with or contradictory of the terms of the deed, as held in the cases cited by respondent's counsel, does not suffice to support his contention. The plaintiff, in respect to the question at issue, is certainly in no better position, so far as the admission of parol evidence is concerned, after the execution of the deed than before; and though the provisions of the written contract, in a general sense, may be said to have been merged in the deed delivered and accepted under it, yet if the deed is not conclusive, when the question arises whether the sale was of two tracts of land accurately described without reference to quantity and for a specific sum, and was a lump sale or a sale of a specific number of acres at a definite sum per acre, the written contract may be referred to, we think, in order to settle the question, and to rebut the claim that the executed contract, as stated in the deed, was not in conformity with the executory one. The contract was one which, by the statute of frauds, was required to be in writing, and the difficulty with the plaintiff's case is that the evidence received, and upon which a recovery was had, does not explain the contract as to the quantity of lands sold,

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or the consideration clause in the deed, but flatly contradicts both, in their most essential and important provisions; and, if admitted, the solemn agreement of the parties is rendered nugatory, without any finding of fraud or mutual mistake.

In most of the cases relied on by the respondent's counsel, there does not appear to have been any such preliminary agreement in writing, particularly in the case of *Cardinal v. Hadley*, 158 Mass. 352. This was a case of error in computing the quantity from known measurements. But, considering the case solely upon the basis of the deed and admissibility of parol evidence, the rule seems to be that evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it. 1 Greenl. Ev. § 285, and cases in note *b*. But whatever the rule deducible from the cases may be, in respect to the extent to which parol evidence may be admitted to explain the consideration clause of a deed, the case seems quite clear on other grounds. No doubt such evidence is admissible, so far as the clause operates as a mere receipt for the consideration money, but, as applied to the instrument in a contractual aspect, a different rule seems applicable. The consideration of the deed in this case may be properly said to be the execution and performance of the mutual obligations of the parties in a previous written agreement between them under seal, in relation to the same subject matter; and the true legal effect of the deed is, no doubt, that it conveys only the lands which the tracts described in fact contain. *McEvoy v. Loyd*, 31 Wis. 145. The language of the contract in this respect is identical with that of the deed, and in the absence of fraud or mutual mistake is conclusive as evidence upon the question of what the contract in fact was, although it is true, as already stated, that in a general sense it has been merged in the deed, so that it cannot now be the foundation of an

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action by either party against the other. Any other view would throw open to question, upon parol evidence, the *quantity* of land agreed to be conveyed, although the preliminary contract in that respect was in the same language as the deed, and was on that account conclusive before the deed was executed. The effect of the parol evidence is to add to the deed a provision it did not contain before, and the case, in this respect, is not distinguishable in principle from *Simanovich v. Wood*, 145 Mass. 180, and cases cited. where it was attempted to show an oral agreement by which a certain incumbrance was not to be within the covenant against incumbrances, in which it was held that "while, for some purposes, it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with a deed, which will cut down or vary the stipulations of his written covenant. This would violate the well-settled rule of law which will not permit a written contract to be varied or controlled by such testimony."

In the case of *Howes v. Barker*, 3 Johns. 506, where B., by articles of agreement, covenanted to sell and convey to H. a tract of land for £9 per acre, and a deed was accordingly executed, and the purchase money paid according to the quantity of acres expressed in the deed, it was held that parol evidence was not admissible to show that there was a mistake in the quantity mentioned in the deed, and that an action for money had and received, to recover back the money paid for the number of acres alleged to be deficient, was not maintainable. This conclusion is supported by very many cases, and among them *Winchell v. Latham*, 6 Cow. 690; *Baltimore P. B. & L. Society v. Smith*, 54 Md. 187; *Williams v. Hathaway*, 19 Pick. 387; *Miller v. Fichthorn*, 31 Pa. St. 258; *Harbold v. Kuster*, 44 Pa. St. 392.

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While the plaintiff, as already noticed, does not allege either fraud or mutual mistake in respect to the quantity of lands in the tracts described, the case was not submitted to the jury on the theory that either had been established, but simply on the basis, as shown by the charge of the court, that if the plaintiff bought, and the defendants sold to him, a given number of acres at a given price per acre, and not a lump contract for a lump price, and the land does not contain so many acres as he bought and they sold, and he has paid for the number of acres bought, then he is entitled to recover the difference at the agreed price per acre. We think that the evidence objected to was improperly received, and that there was error in instructing the jury as stated.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

PALMER, Respondent, vs. BANFIELD, Appellant.

November 10 — November 28, 1893.

Sale of chattels: Acceptance: Waiver of right to return: Who may maintain action? Instructions to jury.

1. Where the vendee of a harvesting machine had the right to return it, either because of defects constituting a breach of warranty or under a condition of the sale that he might return it if dissatisfied, but, after testing it and discovering the defects or determining that he was not satisfied and would return it, he continued to use it, not to make a further test but merely for the purpose of completing his harvest, such use was an acceptance of the machine and the right to return it was thereby lost.
2. Plaintiff was the agent of manufacturers under a contract providing that if he made sales of their machines on terms other than those specified he should be charged as purchaser thereof. He sold a machine to defendant on other terms, was charged as purchaser,

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and paid the manufacturers therefor. *Held*, that he thereby became the owner of the cause of action against defendant for the price of the machine.

3. A refusal to instruct the jury that they might find damages for defendant in case they found in his favor is not a ground for reversal where the verdict was for plaintiff.

APPEAL from the Circuit Court for *Grant* County.

This action is to recover the price of a reaper and harvester alleged to have been sold and delivered by plaintiff to defendant in August, 1892, for the agreed price of $110. The complaint states the contract to have been that defendant should on demand give plaintiff for the price of the machine his two promissory notes for $55 each,—one payable in one year, and the other in two years, from the date of sale, with interest. It is further alleged in the complaint that defendant took, used, and accepted the machine, and that on due demand by plaintiff, made before the action was commenced, that defendant execute such notes, the latter refused to do so.

In his answer defendant denies that the parties made the agreement alleged in the complaint, and avers that the only agreement made in respect to the machine (which is referred to in the answer as a harvester and binder) was as follows: "The defendant was to take and did take said binder to try and use in his harvesting for the years 1892 and 1893, and that, if said harvester and binder did the work satisfactorily to this defendant during said two harvests, then in that event said defendant was to pay said plaintiff the sum of $55 after the harvest of 1893, and the further sum of $55 in the fall of 1894, and not otherwise." The answer further alleges that on a fair trial of the machine it failed to work satisfactorily to defendant, and failed to do good work, whereupon he immediately returned it to plaintiff. The answer also contains a counterclaim for $25 damages for "trouble and expense by reason

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of said harvester and binder failing to work satisfactorily to the defendant."

The cause was tried before the court and jury. The testimony of plaintiff tends to prove the allegations of the complaint, and that of defendant tends to prove the allegations of the answer. It appears by the testimony that the machine was delivered to defendant on a certain Thursday afternoon, and was immediately put to work and developed some defects in its construction. That defendant used it through Friday and discovered other defects going to the capacity of the machine and the principle upon which it was constructed. The testimony tends strongly to show, if it does not prove conclusively, that as early as Friday defendant had discovered all the defects in the machine, was dissatisfied with it, and had decided to return it. However, he used the machine nearly all day on Saturday and until he had finished cutting his grain, and then sent it to Cuba City, one and one-half miles distant, where plaintiff had a place of business, and it was left on a vacant lot formerly occupied by plaintiff. The plaintiff never accepted return of the machine, and has had nothing to do with it since such attempt to return it.

The court refused to give the following instructions proposed on behalf of defendant: "(1) When machinery is guaranteed to do certain work in a satisfactory manner, and not to be paid for until satisfactory to the purchaser, if it is in good faith unsatisfactory to him, and he notifies the vendor of that fact within a reasonable time, there is no sale. (2) If you find that the contract was that the binder was to do work to the satisfaction of the defendant, and that the defendant made an honest effort to make said binder do good work, and if the defendant within a reasonable time returned the binder to plaintiff because he was in good faith dissatisfied with the binder, then your verdict shall be in favor of the defendant. (3) If the jury find in

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favor of the defendant, they may also find such damages, if any, that he may have suffered by reason of the failure of the binder to do the work agreed that it would do by the contract."

The court submitted it to the jury to find what the contract of the parties was, and instructed the jury substantially that if they found it to be as alleged by the plaintiff there was an implied warranty that the machine was suitable for the work it was intended to do, and if not suitable therefor defendant had the right to return it to plaintiff within a reasonable time after discovering its defects. But the court further instructed the jury, if they found that defendant, after "he knew or ought to have known from the test he made that this machine was an unsatisfactory machine on Thursday or Friday, and after determining that he was not satisfied with it, nevertheless went on and worked with it on Saturday for the purpose of completing his harvest, the law would consider that an acceptance of the machine." Also that such acceptance would foreclose defendant's right to return it, and render him liable to pay therefor the agreed price. The court further instructed the jury that, if they found defendant's version of the contract the correct one, he had the right to return the machine if not satisfied with it, unless he had theretofore accepted it under the rule of acceptance above stated; and, if he did thus accept it, the right to return it was lost.

The jury found for plaintiff and assessed his damages at $110 (that being the admitted contract price of the machine) and interest thereon from the commencement of the action. A motion by defendant for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. Defendant appeals from the judgment.

T. L. Cleary, for the appellant, to the point that the first instruction asked and refused should have been given, cited *Exhaust V. Co. v. C., M. & St. P. R. Co.* 66 Wis. 218;

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Silsby Mfg. Co. v. Chico, 24 Fed. Rep. 893; *Manny v. Glendinning*, 15 Wis. 50.

For the respondent there was a brief by *Carter & Burns*, and oral argument by *W. E. Carter*. To the point that the instruction as to an acceptance of the machine by defendant was correct, they cited Benj. Sales, secs. 595, 703–4, and cases cited; *Fairfield v. Madison Mfg. Co.* 38 Wis. 350; *Exhaust V. Co. v. C., M. & St. P. R. Co.* 66 id. 218; 21 Am. & Eng. Ency. of Law, 557–559, and cases cited in note 1 on p. 559.

LYON, C. J. 1. There is no claim in this case for damages for a breach of warranty, either express or implied, on the sale of the reaper and harvester in controversy. The question of warranty is, therefore, of no significance in the case, except as it bears upon the right of defendant to return the machine in case the sale thereof was absolute, as claimed by plaintiff. If the jury found the contract to be as claimed by defendant, under the charge of the court the question of warranty does not necessarily arise, for the jury were instructed that, if they so found, the defendant had a right to return the machine if not satisfied with it, although it may have done such work as would satisfy men generally. The right under such a contract to return the property may be stated a little too broadly in the instructions; but no exception was taken thereto, and it stands as the law of this case. Certainly the rule thus stated allowed the defendant to be dissatisfied with and to return the machine, even though there was no breach of any warranty in respect thereto, either express or implied. Neither is there any controverted question of reasonable time in which to return the machine involved in the case. If the defendant did not, by his use of the machine, destroy the right to return it, if otherwise he had such right, it must be held as matter of law that he returned it, or rather that

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he effectually offered to return it (which amounts to the same thing), within a reasonable time after it came to his possession. So the question is not whether the offer to return was made within a reasonable time, but whether the defendant had any right to return the machine when he attempted to do so.

If the sale was absolute, as claimed by plaintiff, and there was a breach of an express or implied warranty of the machine, and if defendant accepted the machine after testing it and discovering its defects; or if the sale was upon condition that if dissatisfied with the machine the defendant might return it, and if defendant, after testing it, fully determined that it was unsatisfactory to him and he would return it, and afterwards accepted it,— in either case the right to return it was lost. The court instructed the jury that, if defendant ascertained on Thursday or Friday that the machine did not do good work, in the one case; or, in the other case, that he then determined he would return it as unsatisfactory,— if he used it on Saturday, not to test it further, but merely to complete the cutting of his grain and without any expectation that plaintiff or his agent would come there and make the machine satisfactory to him, such use was an acceptance of the machine as a compliance with the contract, and was fatal to his right to return it. We think the court stated the law correctly, and that the testimony justified the submission to the jury of the question of acceptance.

It should be stated that when plaintiff took the machine to defendant he had with him an expert, who assisted in starting it. There is testimony to the effect that, without plaintiff's knowledge, such expert told defendant's son he would return on Friday and see how the machine worked; but he made no promise to go there on Saturday. Plaintiff informed defendant that he would remain at Cuba City (his home being in Galena) until Saturday, where he could

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be notified if the machine did not work right. He remained there until Saturday afternoon, but received no such notice. It is very doubtful whether the expert had authority to bind plaintiff by his promise to return on Friday, the plaintiff being present, acting for himself, although not in hearing at the time. But, waiving that question, the jury might well find from the testimony that defendant had no right to expect, and did not expect, that either plaintiff or the expert would return to defendant's farm on Friday, or at any other time, or that either of them intended or promised to have anything further to do with the machine, unless notified that it did not work well.

2. It results from what is said above that the first and second instructions proposed by defendant are defective, in that they ignore the question of acceptance. They should have been qualified by adding to each a clause to the effect that if defendant accepted the machine in the manner above stated,— that is, by using it to finish his harvest after he had tested it and found that it would not do good work, or he determined that it was unsatisfactory and he would return it,— his right to return it was lost; and the question whether he did so return or offer to return it, or notify plaintiff of his dissatisfaction therewith, within a reasonable time, would be thereby eliminated from the case. The third proposed instruction goes expressly upon the hypothesis that the defendant obtain a verdict. The verdict being for plaintiff, the instruction becomes inapplicable to the case.

3. On the trial the question was raised whether plaintiff owned the cause of action for the price of the machine. It was proved that he was the agent of the manufacturers for the sale thereof and other like machines, under a contract prescribing the terms on which alone sales should be made by him, and providing that if sales were made on other terms plaintiff should be charged with the machines thus

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sold as a purchaser. The sale of the machine in question was not made in accordance with such prescribed terms, and before this action was commenced it was charged to the plaintiff as a purchaser and he paid the manufacturer therefor. Of course, he thus became the owner of the cause of action for the price of the machine.

4. Among the several errors assigned, one is as follows: "The court erred in conveying to the said jury his opinions on the merits of the case by the manner in which he commented on the case and formulated his instructions to the jury." The learned counsel for defendant stated in his argument that this is the main error on which he relies for a reversal of the judgment, and he explained in a very interesting manner how an honest judge may be unconsciously betrayed into actions and expressions in the presence of the jury very prejudicial to the cause of one or the other of the parties. And so, while paying a high and well-deserved tribute to the integrity, ability, and desire to do exact justice in all cases of the judge who presided at the trial, he argued that this is a case of unconscious bias on the part of the judge against the case of the defendant, and sought to prove its existence from the record. It is almost, if not entirely, inevitable that he should fail. This court can only know from the record what the judge said and did on the trial. It is sufficient to say that the most searching scrutiny of the record not only fails to disclose the existence of any such bias, but it fails to raise even a suspicion of its existence. We find neither error nor impropriety in any of the remarks of the judge on the trial which are referred to by counsel in support of his position. Neither do we find any error in the rulings of the court on the trial, or in the charge to the jury.

By the Court.— The judgment of the circuit court is affirmed.

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McCORMICK, Respondent, vs. HERNDON, Appellant.

November 10 — November 28, 1893.

Deed absolute or mortgage? Evidence: Specific performance: Adverse possession.

1. The positive and uncontradicted testimony of the widow and two sons of the grantor, who were present when the deed was executed, that, though absolute in form, it was given to secure a debt, and that the grantee orally agreed to execute a defeasance, is *held* sufficient to support a finding that the deed was in fact a mortgage, there being nothing against such testimony but the mere suspicion that it might not be true.
2. The deed in such a case may be given the effect of a mortgage without specific performance of such oral agreement being obtained.
3. The grantor of land continuing in possession after the conveyance cannot set up adverse possession against his grantee, but holds as tenant for the latter until he explicitly disclaims such relation.

APPEAL from the Circuit Court for *Grant* County.

Ejectment. The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by *J. T. Mills* and *S. H. Taylor*, attorneys, and an additional brief by *J. S. Anderson*, of counsel, and oral argument by *Mr. Anderson*. He contended, *inter alia*, that in an action of ejectment a mistake in the deed or other facts outside the record which avoid its effect may be shown only when an equitable counterclaim has been interposed. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 317. The plaintiff must recover upon the strength of his own title and not on the weakness of the defendant's, and when reference must be had to facts outside the record in order to avoid the effect of the outstanding title he should apply to a court of equity to have his title cleared before proceeding in ejectment. *Casgrain v. Milwaukee Co.* 81 Wis. 113; *Spiess v. Neuberg*, 71 id. 279; *Prickett v. Muck*, 74 id. 207. Plaintiff, as the grantee of

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Wm. H. Garner or his heirs, may have a right in equity to a decree of specific performance declaring the absolute deed to be a mortgage; but such relief cannot be had in this case, where the parties to the transaction are not before the court and where there was no proper pleading to give the court jurisdiction. *Smith v. Hunt*, 13 Ohio, 260; *Reece v. Allen*, 10 Ill. 236; *Gillett v. Treganza*, 13 Wis. 472; *Eaton v. Smith*, 19 id. 537.

For the respondent there was a brief by *Bushnell & Watkins*, and oral argument by *A. R. Bushnell.*

ORTON, J. This is the third time this case has been before this court. On the first trial the defendant recovered, and the judgment was affirmed, and the plaintiff took a new trial under the statute. On the second trial the plaintiff recovered, and the judgment was reversed and a new trial ordered. On the last trial the plaintiff recovered, and the defendant has appealed.

The facts are substantially the same as on the second trial. The action is in ejectment, and the only land now in question is the E. ½ of the W. ½ of the N. W. ¼ of section 30, township 3 north, range 4 west. The land was entered by John H. Garner on the 16th day of January, 1855. John H. Garner conveyed it to William H. Garner, by warranty deed, September 17, 1858, and William H. Garner and his family occupied and improved the land as his own until his death, about 1871; and his widow and children continued to reside on the land and improve it and pay taxes thereon until 1879 or 1880, when they removed to Nebraska and left the land in the possession of a tenant until March, 1881. The defendant went into possession of the land in about 1883 under a quitclaim deed from one John Yager, who held it by a tax deed which has since been declared void, but the defendant is still in possession. The widow and heirs of William H. Garner, deceased, deeded the land to the plaintiff on the 12th day of December, 1883.

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Up to this point the title of the plaintiff appears to be perfect, and the defendant does not claim to have any title beyond mere possession under said quitclaim deed. For the purpose of retaining his possession, the defendant introduced a warranty deed executed in July, 1859, by William H. Garner and wife, of this land, to one John B. Wheeler, of the state of New York, for the consideration expressed of $175. The plaintiff contends that this deed was in effect a mortgage to secure the payment of $175 that Garner owed Wheeler, and upon its payment the land was to be reconveyed to Garner; that Ezra Wheeler, the son of John B. Wheeler, was the agent of his father in this transaction, and agreed that on his return to New York, and the delivery of said deed to his father, they would send back to Garner a bond or contract of defeasance for the reconveyance of the land on the payment of the $175. John B. Wheeler died soon thereafter without executing such contract. These facts were substantially proved by the testimony of Parmelia Garner, the widow of said William H. Garner, deceased, and of William J. Garner and John W. Garner, their two sons, who were present when said deed was executed. The testimony of these witnesses is so positive and explicit that if it is not true they are guilty of perjury, and there can be no other conclusion. We are aware of the rule that, in order to convert a deed absolute on its face into a mortgage, the evidence must be very clear and convincing. This testimony is uncontradicted, and there is nothing but a mere, bare suspicion that it may not be true against it. There does not seem to be any good reason why the jury should not have believed it. The jury found that this deed was intended to be a mortgage to secure an indebtedness of William H. Garner to John B. Wheeler, which Garner was under legal obligation to pay, whether he was willing to do so or not. We are compelled to say that this finding is supported by the testimony.

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The nature and interpretation of a mortgage as affecting the title of the mortgagor in this state are too well known to require authorities. The title in fee simple of the mortgagor is not impaired or changed in any respect whatever by his execution of the mortgage, but remains in him as before. The mortgage is a mere security for the debt, a mere lien on the land, and collateral to the debt, and follows it, and is a personalty which does not descend to the heirs but goes to the administrator. *Brinkman v. Jones*, 44 Wis. 498.

The title of William H. Garner to the land, therefore, remained as perfect after the execution of the deed as before, if the deed was in fact a mortgage. It is contended by the learned counsel of the appellant that before the deed can be given such effect a specific performance of the verbal agreement of John B. Wheeler to execute the defeasance should be obtained in chancery. That does not seem to be necessary. As soon as the deed is proved and decided to be a mortgage, it is a mortgage to all intents and purposes, with all of its incidents and legal characteristics as it affects the title of the land. Such specific performance no doubt might be obtained, so that the agreement might not rest in parol, but I can find no authority that this is necessary. All authorities agree that the deed may be proved to be a mortgage by parol evidence. *Dobbs v. Kellogg*, 53 Wis. 448.

This finding of the jury is sufficient to entitle the plaintiff to recover, without the seeming inconsistent finding of title by adverse possession. There is no evidence that William H. Garner ever disclaimed the title of John B. Wheeler as his grantee, or claimed to hold by any other title. Although this finding may be unnecessary, and perhaps inconsistent with the fact that said deed is a mortgage, the doctrine that a grantor of an absolute deed, continuing in possession, may set up adverse possession

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against his grantee, should at least be questioned. He does not so continue in possession as owner, but as tenant for his grantee. He will be treated as holding the premises in subserviency to his grantee until he makes an explicit disclaimer of such relation. *Butler v. Phelps*, 17 Wend. 642; *Furlong v. Garrett*, 44 Wis. 111; *Ronan v. Meyer*, 84 Ind. 390; *Higginson v. Mein*, 4 Cranch, 415; *Beach v. Catlin*, 4 Day, 284; *Olwine v. Holman*, 23 Pa. St. 279; 1 Am. & Eng. Ency. of Law, 247. The plaintiff's title is made good by converting the deed to Wheeler into a mortgage, and, when she sets up adverse possession as against that deed as an absolute conveyance, she destroys the basis of her legal title. The two theories are inconsistent.

By the Court.— The judgment of the circuit court is affirmed.

LAUE, Respondent, vs. THE CITY OF MADISON, Appellant.

November 11 — November 28, 1893.

Municipal corporations: Injury from defective sidewalk: Specification of defects in notice: Constructive notice: Evidence: Court and jury: Improper argument to jury: New trial: Discretion.

1. Where the notice given pursuant to sec. 1339, R. S., accurately states the place where an injury occurred and describes generally the insufficiency or want of repair which occasioned it, the complaint and evidence need not be confined strictly to the precise defects described or mentioned in the notice. Thus, where the notice stated that at the point where plaintiff slipped and fell on the sidewalk there was a steep and dangerous descent, that the boards were old and rotten, that there were no slats nailed across the walk, and that when wet by rain it became exceedingly slippery, it was proper to allow plaintiff to allege and prove the actual condition of the walk, including the facts that it had a lateral pitch and that rains carried slippery mud upon it from the adjoining lot.
2. Upon the evidence in this case — tending to show that the walk was as above described and that this condition of things had existed for

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years — it was not error, as against the city, to submit to the jury the questions whether the walk was insufficient and whether the city had constructive notice of that fact.

3. There was no error prejudicial to the city in instructing the jury that the walk could not be held insufficient because lengthwise it followed the slope of the ground, but that it was for them to determine whether or not it was unsafe because of the extent of its pitch toward the street, and of its being so that earth would wash upon it from the adjacent lot, if they found that earth did so wash upon it.

4. If counsel pursue an improper line of argument to the jury, exception thereto should be taken and a ruling had thereon at the time, so that the error, if any, may appear from the record.

5. A motion for a new trial on the ground of improper argument to the jury is addressed to the discretion of the trial court, and its decision will not be disturbed except in case of an abuse of such discretion.

APPEAL from the Circuit Court for *Iowa* County.

On the evening of November 21, 1889, the plaintiff fell and broke his arm and was otherwise injured, by reason of an alleged defective sidewalk. January 28, 1890, the plaintiff notified the city and its mayor and clerk of such injury and defect at the place described in the opinion, and also that the plaintiff claimed damage by reason thereof in the sum of $5,000. February 21, 1890, this action was commenced to recover such damages, by the service of the summons and the original complaint. That complaint was amended September 24, 1891. The answer put in issue the negligence of the defendant. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $1,800. From the judgment entered thereon the defendant appeals.

Burr W. Jones, for the appellant, contended, *inter alia*, that it was error to admit evidence of the notice of claim against the city and of the lateral pitch of the sidewalk and of the condition of the yard of the adjoining lot allowing mud to be washed upon the walk. The notice

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made no allusion to these defects on which the plaintiff chiefly relied at the trial and on which the case was finally submitted to the jury. The case does not come within that line of authorities which holds that mere errors are not fatal, provided the notice is sufficient to apprise the officers of the real defect complained of. *Sowle v. Tomah*, 81 Wis. 353; *Billings v. Worcester*, 102 Mass. 329; *Goodwin v. Gardiner*, 84 Me. 278; *McDougall v. Boston*, 134 Mass. 149; *Weber v. Greenfield*, 74 Wis. 234. There was no defect in the walk. In its linear slope it merely followed the slope of the hill, and it could not have been constructed otherwise. Its lateral slope was such as all properly constructed walks have, to carry off water into the gutter. City authorities are not bound to so construct their walks that persons are not liable to fall upon them in rainy weather, and the slipperiness of a walk occasioned by mud and rain cannot be made the ground of a recovery. See *Cook v. Milwaukee*, 27 Wis. 192; *Perkins v. Fond du Lac*, 34 id. 435; *Hill v. Fond du Lac*, 56 id. 248; *Schroth v. Prescott*, 63 id. 652; *Grossenbach v. Milwaukee*, 65 id. 31; *Ayres v. Hammondsport*, 130 N. Y. 665; *Taylor v. Yonkers*, 105 id. 202; *Hausmann v. Madison*, 85 Wis. 187; *Chamberlain v. Oshkosh*, 84 id. 289. The city never had any notice of the defects. The lateral pitch of the walk was not of such a character as to attract attention, and so far as the testimony shows the pretended defects relied on had never been noticed by any human being. The city officers were therefore not bound to take constructive notice of them. *Burns v. Bradford*, 137 Pa. St. 361; *Broburg v. Des Moines*, 63 Iowa, 523; *McGrail v. Kalamazoo*, 94 Mich. 52; *Tice v. Bay City*, 84 id. 461; *Bailey v. Spring Lake*, 61 Wis. 227; *Bergevin v. Chippewa Falls*, 82 id. 505; *Goodnough v. Oshkosh*, 24 id. 549. The instruction by which the jury was allowed to find the walk defective if the earth could wash upon it from the adjacent lot, was

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erroneous. City officers are not bound to invade the private rights and property of adjoining owners in order to keep streets in repair. *Billings v. Worcester*, 102 Mass. 329; *Taylor v. Peckham*, 8 R. I. 349, 5 Am. Rep. 578; *Jones v. Waltham*, 4 Cush. 299; *Hixon v. Lowell*, 13 Gray, 59; *Jones v. Boston*, 104 Mass. 75. Municipalities are not liable for defects or want of efficiency in the plan adopted for the construction of their streets. 9 Am. & Eng. Ency. of Law, 380; *Child v. Boston*, 4 Allen, 41; *Easton v. Neff*, 102 Pa. St. 474; *Urquhart v. Ogdensburg*, 91 N. Y. 67; *Williams v. Grand Rapids*, 59 Mich. 51; *Lansing v. Toolan*, 37 id. 152.

For the respondent there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler*.

CASSODAY, J. It appears from the record that Livingston street runs in a southeasterly and northwesterly direction, and crosses Williamson street at right angles; that Jenifer street is parallel to Williamson street, and is the next street southeasterly therefrom; that on the south corner of the junction of Livingston and Williamson streets there is a store building and dwelling house, fronting northwesterly on Williamson street, occupied by one Deike; that the sidewalk on the southwesterly side of Livingston street runs along within a few feet of the building; that there was at the time a picket fence, with a board along the bottom, separating the walk from the yard, at or near the rear end of the building; that the walk along there was at the time from four to five and three-quarters feet in width; that the earth on the side of the walk towards the building was three or four inches higher than the walk, and flush with it; that opposite the rear end of Deike's building the walk was about five feet higher than the sidewalk on Williamson street; that the pitch or descent in the walk where the accident happened was about eleven inches in ten feet on the

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outer edge of the walk, and a little more than that on the inner edge; that the descent was less rapid nearer Williamson street; that the average slope towards Williamson street was about eleven and one-half inches in ten feet; that the walk along Livingston street follows the natural surface of the ground; that the sidewalk on Jenifer street was about twelve feet higher than the sidewalk on Williamson street; that at the place of the accident the walk was five and one-half feet wide, and pitched or descended towards the street five and one-fourth inches on the full width, or about one inch to the foot; that the street was two or three feet lower than the walk; that the walk was constructed of old boards, originally an inch in thickness, laid crosswise upon three stringers; that there were no slats on the walk; that it was not a firm walk, but was springy in the center; that at the time of the accident the boards had rotted down so that they were not more than three fourths or five eighths of an inch in thickness in the center, and the edges and bottoms were entirely rotten; that the sidewalk was sunk in the ground at the point of the accident so that the boards projected into the bank or ground towards the building; that there was a gradual slope from the sidewalk up into Deike's back yard; that in time of rain the walk at the place of the accident was subject to be overflowed by the water and mud falling into the yard; that after a rain storm there was generally a broad streak across the walk, of a rather slimy, gummy substance, of dirt and moss and stuff mixed; that there was no gutter or other provision to prevent this; that the water that fell in the yard and on the roof of the building went right over the sidewalk; that the rain carried mud along, and left it on the sidewalk, and made it slippery after a rain storm; that this condition of things had existed for years; that at the time and place of the accident the walk was wet, muddy, and slippery; that about 7 o'clock

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in the evening of November 21, 1889, the plaintiff, who was at the time 53 years of age, started from his home on Jenifer street to go to Deike's store, to buy groceries; that in going he went along the sidewalk in question towards Livingston street; that it was a rainy day, and was dark and raining at the time; that he was carrying an umbrella and a half-gallon jar; that the wind was coming up from Williamson street, so that he held the umbrella just before his face; that when he came to the corner of Deike's building his feet slipped out from under him, and he fell and broke his arm and was otherwise injured. Such is a general outline of the evidence in support of the verdict.

1. It is contended that the complaint and evidence should have been confined strictly to the precise defects described or mentioned in the notice, and that the admission of evidence of other defects was error. No question is made that the notice did not accurately describe the place of the accident; nor that it did not state the absence of slats or cleats; nor that it did not state that the boards were old and by long usage had become thin, rotten, and weak; nor that it did not state that whenever it was wet or moist by rain it became exceedingly slippery and very unsafe, insecure, and dangerous to pass over; nor that it did not state that the sidewalk, at the time and place in question, was very steep and unsafe to walk over; nor that it did not state that for some distance on either side of the same it was very steep and of dangerous descent. All those things were stated. But it did not state which way the walk descended, nor that the bank or ground on the lot side came up flush with the ends of the boards on the walk, so that the water from the yard and the roof of the building naturally ran down and carried mud upon the walk, nor that the walk was sunk in the ground, and the boards upon it springy. Should the evidence of these things, not so stated, have been excluded? The statute declares that the notice shall state "the place

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where such damage occurred, and describe *generally* the insufficiency or want of repair which occasioned" the injury. Sec. 1339, R. S. As indicated, the notice accurately stated the place of the injury and, in a general way, its physical features, so that no one with that notice in his hand, looking for the place described, could fail to find it. In the language of Mr. Justice ORTON in *Fopper v. Wheatland*, 59 Wis. 628: "The plaintiff is not required to make a map of its topography, with sensible objects noted upon it at and near the place, and with courses and distances from and to places and monuments, so that a surveyor could find it with his chain and compass. The only possible object of the notice is to notify the authorities of the town of the place with reasonable certainty, and so that they can readily find it with reasonable diligence." In that case the notice, in some respects, was inaccurate. Nevertheless, it was held to be sufficient. So it has been held that where such notice describes the place of the injury as a bridge, when in fact it was a culvert, it is nevertheless sufficient, if it otherwise designates the place in such a way that it can be found without difficulty. *Wall v. Highland*, 72 Wis. 435; *Salladay v. Dodgeville*, 85 Wis. 318. True, the statute not only requires that the notice should state the place where the damage occurred, but that it should describe in a "*general*" way the insufficiency or want of repair. But a statute is always to be construed with reference to its object, and, as indicated, the object of this statute was to enable the authorities to investigate the question of the defendant's liability. *Spellman v. Chicopee*, 131 Mass. 444; *Welch v. Gardner*, 133 Mass. 529; *Canterbury v. Boston*, 141 Mass. 215; *Liffin v. Beverly*, 145 Mass. 549; *Tuttle v. Winchester*, 50 Conn. 496. Without such "*general*" description of the insufficiency or want of repair, such authorities might, in some cases, be misled as to the defect which caused the injury. But in the case at bar we think the general descrip-

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tion given in the notice was sufficient to authorize the plaintiff to allege and prove the actual condition of the walk at the time and place of the injury.

2. We are clearly of the opinion that within the principles stated in *Hart v. West Side R. Co.*, *post*, p. 483, the evidence is sufficient to support the verdict. Within the repeated adjudications of this court, the trial judge was justified in refusing to grant the nonsuit and in submitting the question of negligence to the jury. *Richards v. Oshkosh*, 81 Wis. 228, and cases there cited.

3. Manifestly, the court properly submitted the question to the jury as to whether the alleged defective condition of the walk had existed for such length of time prior to the accident that the defendant should, with reasonable care and diligence, have discovered and remedied the same.

4. Exception is taken because the court charged the jury that "a city is not required to grade down its streets so that its sidewalks shall be level. In constructing its walks, it may, as a general rule, follow the natural slope of the ground, although by doing so its walks may not be as safe when it is raining, or when there is snow or ice, as they would be if level. The sidewalk in question cannot be held to have been insufficient because lengthwise it followed the slope of the ground. It is for you to say whether or not the sidewalk where the plaintiff fell was not in a reasonably safe condition *because of the extent of its pitch toward the street, and of its being so that the earth would wash onto it from the side next Deike's lot*, if you find from the evidence that earth did wash onto it from that side." It is very doubtful whether the exception to such portion of the charge, which is general, is sufficient to raise the question whether the last clause, standing alone, would be error. However that may be, we are of the opinion that the charge contains no error which is prejudicial to the defendant. As said in *Hart v. West Side R. Co.*, *post*, p. 483, "as a general

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rule, negligence is to be deduced as an inference of fact from several facts and circumstances disclosed by the evidence, after their connection and relation to the matter in issue have been traced and their weight and force considered." This rule is peculiarly applicable to the case at bar. The important question for the jury to determine was whether, at the time and place in question, the sidewalk was in a reasonably safe condition for travel. This necessarily involved all the several facts and circumstances constituting such conditions. The error of the charge, if any, was in eliminating from the case the element of the slope or descent lengthwise the walk, and confining the jury to the pitch or descent towards the street, and its being so that the earth would wash upon it from the side next Deike's lot. The vice of eliminating one or more elements going to make up such condition or negligence was considered in *Heddles v. C. & N. W. R. Co.* 74 Wis. 255–257. In *Stilling v. Thorp*, 54 Wis. 536, 537, the condition of the bridge was somewhat like the walk in question, and it was said: "In charging the jury the court was bound to keep in view these admitted facts and the evidence in the case. The jury were not to be instructed upon law in the abstract, but only as to the law applicable to the admitted facts and the evidence of the respective parties. The court was not, therefore, bound to submit to the jury the effect of mere slipperiness from the ordinary action of the elements, as ice and snow, in a bridge properly constructed and having a level surface, but only to give such instructions as should be requested as to the law applicable *to that bridge in its then present condition* as revealed by the evidence of the respective parties." Such condition necessarily involved all the elements going to make up the same. In this respect it is like circumstantial evidence, which "is defined to be where the proof applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

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. . . In such a case it is obviously misleading to separate each collateral fact going to make up the chain of circumstances which would, together, thus force conviction of the principal fact in controversy, and then, with qualification, instruct the jury that such isolated collateral fact was not sufficient of itself to establish such principal fact." *United States Exp. Co. v. Jenkins*, 64 Wis. 545, 546. Manifestly the errors mentioned could not have worked to the prejudice of the defendant, although they might have operated to the serious prejudice of the plaintiff.

5. It is contended that a new trial should have been granted because of the improper line of argument of counsel for the plaintiff. The conduct of the trial must necessarily be left with the trial court, in the first instance. If that court commits an error, its rulings may, of course, be corrected here. No exception to such line of argument appears to have been made at the time,— much less was any ruling made thereon, as there should have been. *Mulcairns v. Janesville*, 67 Wis. 35; *Heucke v. M. C. R. Co.* 69 Wis. 409. Such line of argument is only made to appear by affidavits on a motion for a new trial. Such motion was necessarily addressed to the discretion of the trial court. There is certainly more reason for holding that there was no abuse of such discretion in refusing that motion, than in refusing to disturb the judgment in *Baker v. State*, 69 Wis. 41, where it was said: "Counsel necessarily have a broad latitude. Where counsel on one side transcend their privilege, counsel on the other side may, without jeopardizing their case, follow them and indulge in proper comments upon the same matter. . . . The trial judge is necessarily familiar with all such facts and circumstances, as well as all shades of the evidence. He must necessarily have a broad discretion in such matters. . . . Error is not to be presumed in such a case. If counsel abuse their privilege or the court its discretion, it should

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be made to appear affirmatively by incorporating all essential facts and circumstances showing it in the record. . . . We cannot say from this record that there was such abuse of privilege or discretion."

The verdict does not appear to be excessive.

By the Court.— The judgment of the circuit court is affirmed.

HOSLEY and others, Appellants, vs. WISCONSIN ODD FELLOWS MUTUAL LIFE INSURANCE COMPANY, Respondent.

November 11 — November 28, 1893.

Place of trial: Where "cause of action" arises: Life insurance.

1. The words "cause of action," as used in subd. 5, sec. 2619, R. S., include the act or omission without which there would be no cause of action or right of recovery.
2. Where, by the terms of a policy and the by-laws of the company, payment of life insurance moneys is to be made by a check delivered to the beneficiaries, a default, if any, in such payment takes place in the county in which the beneficiaries have continuously resided; and under subd. 5, sec. 2619, R. S., an action on the policy is triable in that county.

APPEAL from the Circuit Court for *La Crosse* County.

The appeal is from an order changing the venue from La Crosse to Milwaukee county upon application of defendant. The defendant is a domestic insurance corporation, existing under ch. 43, P. & L. Laws of 1869, and ch. 1, Laws of 1887.

On May 10, 1889, the defendant insured the life of Matthias Hosley, a resident of La Crosse, for the benefit of his wife and children, and issued to him three policies or certificates of insurance of $1,000 each. Hosley died June 25, 1892, while still a resident of La Crosse, being at the time temporarily in Chicago. His wife and children, who are

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the plaintiffs in this action, continued to reside at La Crosse, and still reside there. The certificates provided for payment of the insurance to the beneficiaries within ninety days after due proof of the death of the insured shall have been received by the secretary. Sec. 14 of the defendant's amended charter (ch. 1, Laws of 1887) provides as follows: "Within ninety days after the receipt by the secretary of due proofs of the death of any member . . . there shall be paid to the beneficiary" the sum called for by such certificate. Sec. 14 of defendant's by-laws provides that upon receipt of proofs of death the defendant's secretary shall immediately examine the case, and, if he finds that the deceased's certificate of membership was valid and in full force and effect at the time of his or her death, the president shall, within ninety days after the receipt of said proofs, draw his warrant on the treasury, countersigned by the secretary, for the amount due, payable to the person or persons entitled thereto; and the secretary shall within such ninety days transmit or deliver the same to the person entitled thereto, and take his or her receipt therefor.

This action was commenced in La Crosse county. The complaint set forth, among other things, the issuance of the policies, the due performance by Hosley of all the conditions and obligations required of him, the death of Hosley, June 25, 1892, the furnishing of complete proofs of death, the fact that more than ninety days had elapsed since the furnishing of such proofs, and the defendant's neglect to pay the loss. Upon the complaint and an affidavit showing, among other things, that the defendant's principal office and place of business was and still is in the city of Milwaukee, the defendant moved that the venue of the action be changed to Milwaukee county, under subd. 5, sec. 2619, R. S. Upon this motion the plaintiffs showed by affidavit, among other things, their continuous residence in

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La Crosse from the time of the issuance of the policies up to the time of the commencement of the action. From an order changing the venue to Milwaukee county, plaintiffs appeal.

For the appellants there was a brief by *M. P. Wing*, attorney, and *C. L. Hood* and *H. P. Richardson*, of counsel, and the cause was argued orally by *J. D. Gurnee*. To the point that defendant was bound to seek the plaintiffs and pay them, and failure to do so was a breach of the contract, they cited Bishop, Cont. sec. 1237; 2 Parsons, Cont. 637–8 and note; 2 Chitty, Cont. (11th Am. ed.), 1069; *Lee v. Selleck*, 33 N. Y. 615, 618.

For the respondent there was a brief by *L. H. Mead* and *Geo. W. Bird*, and oral argument by *Mr. Bird*. They contended, *inter alia*, that the death having occurred in Illinois, it should be held that the cause of action arose where the breach or wrong occurred, which was in Milwaukee county. *Veeder v. Baker*, 83 N. Y. 156; *Ithaca Fire Dept. v. Beecher*, 99 id. 429; *Bank of Ky. v. Harrison*, 1 Bush, 384; *Foster v. Wade*, 4 Met. (Ky.), 252; *Rodgers v. Mut. Endow. Asso.* 17 S. C. 406; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Jackson v. Spittall*, L. R. 5 C. P. 542; *Durham v. Spence*, L. R. 6 Exch. 46; *Howell v. Young*, 5 Barn. & C. 259.

WINSLOW, J. Under subd. 5, sec. 2619, R. S., the proper place of trial of this action is the county in which the defendant has its principal office or place of business, or in which the cause of action, or some part thereof, arose. That the defendant's principal office is in Milwaukee is undisputed; but still, if the cause of action, or some part thereof, arose in La Crosse, the place of trial should not, under the section quoted, be changed. The question, therefore, is, Did the cause of action, or any part of it, arise in La Crosse county? We think this question must be an-

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swered in the affirmative. As was said in *Bruil v. Northwestern M. R. Asso.* 72 Wis. 430, "the words 'cause of action' . . . include the act or omission without which there would be no cause of action or right of recovery." Of course, the making of the contract, the payment of the premiums, the death of the assured, and the furnishing of the proofs of death, are all essential and vital facts without which there would be no cause of action; but even with all of these facts no cause of action would be complete until ninety days had passed after the receipt of proofs without payment. It was the default in payment within the ninety days which made the cause of action perfect. Prior to this default an action would have been premature. This default took place in La Crosse county, because by the contract and by-laws of the company the check was to be delivered to the beneficiaries, and, as they were continuously residents of La Crosse, that delivery was to take place in La Crosse county. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367. We conclude that the default, without which there could be no recovery, occurred in La Crosse county.

By the Court.— Order reversed, and action remanded for further proceedings according to law.

MEGOW, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

November 11 — November 28, 1893.

(1) *Railroads: Injury to property by fire: Nonsuit.* (2) *Appeal: Bills of exceptions: Cases and briefs.*

1. In an action for injury to a cranberry marsh by fire, a nonsuit was properly granted upon evidence which left it a matter of conjecture whether the injury was caused by the original fire started by de-

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fendant twelve miles distant or by back-fires started to prevent its spread.

2. Circuit Court Rule XXIV, as to the preparation of bills of exceptions, and Supreme Court Rules VIII and IX, as to the preparation and printing of cases and briefs, will be strictly enforced.

APPEAL from the Circuit Court for *Juneau* County.

The case is stated in the opinion.

J. J. Hughes, attorney, and *G. Stevens*, of counsel, for the appellant.

For the respondent there was a brief by *C. H. Van Alstine*, attorney, and *John T. Fish*, of counsel, and oral argument by *Mr. Fish*.

PINNEY, J. This action was brought by the plaintiff to recover damages against the defendant for burning over his cranberry marsh, situate on the N. W. ¼ of the S. E. ¼ of section 3, township 18, range 2, in Juneau county, on the 9th day of August, 1886; and it is claimed that the fire which did the injury was negligently caused by the defendant, and was communicated on the 28th day of July, twelve days previous, to the grass, rubbish, and decayed vegetable matter on and along the right of way of the defendant between sections 21 and 22 in town 20, range 2, at a point over nine miles nearly directly north of the plaintiff's premises, and from which point the fire spread over and upon the marsh lands between Beaver brook and Little Yellow, a branch of Yellow river, passing in a circuitous route to the southeast, and finally to the southwest, where it is claimed the fire reached the plaintiff's premises and caused the damages in question. The distance which it is thus claimed the fire ran in twelve days was over twelve miles, and the country over which it passed on both sides of this route, and to the north and south as well, consists of a large marsh, interspersed with patches of hard land covered with oak bushes and scrubs and a few scattering jack

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pines in places. The marsh was boggy, and at times quite wet, and had not been burned over regularly, so that in many places there had accumulated layers of decayed grass of former years, beaten down among the peat bogs; and the marsh was at the time covered with the then green growth of the season. The season had been an unusually dry one, and the dead grass and decayed vegetation and bogs were in a condition favorable to the spread of fire. The wind for the most part was from the northwest and north, and finally from the northeast.

Owing to the distance the fire is claimed to have spread, and the twelve days it was burning, and such intervening patches or bodies of hard ground covered with bushes, etc., great difficulty was experienced in attempting to trace the fire from the point of its origin to the plaintiff's premises, and in showing that this fire thus negligently communicated to the marsh, as it is claimed, burned over the plaintiff's cranberry marsh; and this difficulty was very materially increased by the fact that several back fires had been set at intervals in the mean time to intercept and prevent the passage of the original or main fire to the south, and the further fact that no witness was produced who was able to testify as a fact within his knowledge that the original fire caused the injury complained of, and that those who saw the fire burn over the plaintiff's marsh were unable to say as a fact that it was not the result of the back fires instead of the original fire. The witnesses upon whose testimony the plaintiff relied to trace the fire only saw it progressing in a southeast direction occasionally and for no considerable portion of the time it was running the entire distance, and almost invariably at a time when engaged in back-firing or making barriers to its progress in order to protect property of their own, and which particularly engrossed their attention. The evidence shows that when the marsh was set on fire in back-firing or otherwise,

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it might be apparently entirely whipped out or quenched with water, still the fire would get in the layers of dead grass or peat bogs and smoulder for days even, until, its immediate surroundings becoming dry by the action of the sun and fire, it would be fanned into action by a slight wind, and, communicating with the grass near by, would be kindled and spread into a raging and destructive fire. Another difficulty experienced, known to all familiar with such fires, was that the fire, whether a back fire or original fire, will often work back against the wind, get a new head, and suddenly spread to localities to which it did not seem probable the fire would extend.

The evidence is quite lengthy, and the trial doubtless occupied some days. After it was closed on both sides the defendant moved for a nonsuit, and the circuit court granted it, for the reason, in substance, that there was not sufficient evidence to go to the jury to show that the original fire caused the injury complained of, and not the back fires put out to interrupt its progress, acting upon the rule laid down in *Marvin v. C., M. & St. P. R. Co.* 79 Wis. 140.

The fire-breaks and back-firing were nearly on a direct line south towards the plaintiff's premises, while, by the plaintiff's contention, the course of the fire caused by the defendant diverged in a southeasterly direction about three or four miles, crossing Little Yellow and again recrossing it and passing back to the southwest to the plaintiff's premises. The back-firing was on interior and shorter lines, and about eight of these back fires were set at intervals between where the fire broke out and the plaintiff's premises; and there is evidence showing that in three instances, at least, the back fires escaped and went easterly and south, and there is no satisfactory evidence that they were extinguished. For two days before the fire burned the plaintiff's premises the entire country to the north was on fire for several miles in breadth, and whether the injury complained

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of was in fact caused by the first fire, which passed to the southeast and again to the southwest, or a line of fire on the west of it, moving south, is left, so far as the evidence goes, to mere conjecture, and more extended comments on the evidence would serve no useful purpose. If the case had been sent to the jury, they would have been left to guess at or conjecture a result which the law requires should be fairly established by competent evidence. Such was the opinion of the court after hearing the evidence as it was produced, and with advantages for understanding and appreciating its force and weight which we do not possess.

The argument here necessarily proceeded without previous reading of the evidence, and without a carefully prepared brief outlining and stating in detail the points relied on by the appellant, with references to the folios of the case where the evidence would be found which it was claimed was sufficient to support them and warrant a verdict; and, while the case was argued very fully, under such circumstances an oral argument, of itself, on a complicated and uncertain state of facts, fails to give the court the necessary explanation and assistance to properly understand the case. The bill of exceptions extends over 165 pages, consisting only of the stenographer's notes, prefaced by a caption, and closing with the formal conclusion of a bill. It is in no proper sense in compliance with Rule XXIV of the Circuit Court Rules, and the case is extremely defective for want of proper proof-reading, sentences being improperly divided which probably were originally very obscure; and references to various points in the evidence are so imperfect that it is extremely difficult, and in several instances impossible, to arrive at the real force and meaning of the evidence. We have not been favored with a brief on behalf of the appellant in compliance with the rule, stating succinctly the points and grounds relied on by the appel-

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lant in order to trace the fire from where it was set or broke out to the plaintiff's land in question, with suitable references to the folios of the case, but merely with a meager statement of less than a page, and an imperfect sketch map, and a reference to the "Case, page 1 to 124." Neither the case nor brief is in compliance with the rules of this court, and we take this occasion to say that in the future the court will be forced to decline the examination of cases so imperfectly prepared, and that Rules VIII and IX in respect to the preparation and printing of cases and briefs in this court, as well as the rule in respect to the preparation of bills of exceptions, will be strictly enforced. We have, however, examined the case with care, to see if error in the ruling of the circuit court was shown affirmatively by it, but have been unable to see any safe or substantial ground upon which we ought to interfere to reverse the decision of the circuit court, and its judgment must therefore be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

HOFFMAN, Appellant, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

HOFFMAN, Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 11—November 28, 1893.

New trial for misconduct of juror: Appeal: Bill of exceptions: Terms.

1. Where an order granting a new trial on the ground of misconduct of a juror is based on the minutes of the court and certain affidavits, it will not be disturbed on appeal if such minutes are not before the appellate court, even though the affidavits do not sufficiently establish the alleged misconduct.

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2. Where the successful party is not responsible for the misconduct of a juror, and such misconduct does not of itself render the verdict of the whole jury a perverse verdict, the granting of a new trial because of such misconduct is a matter of discretion, and it should be granted only on the terms that the moving party pay the costs of the former trial.

APPEALS from the Circuit Court for *Wood* County.

The action is to recover damages for the alleged negligent starting of a fire by defendant railway company on its right of way in Wood county, which fire spread over plaintiff's cranberry lands and destroyed the crop and plants growing thereon. The action was tried before the court and a jury, and the plaintiff had a verdict. At the same term a motion, founded on the minutes of the court, was made on behalf of the railway company to set aside the verdict and for a new trial. Several grounds of motion are stated, one of which is as follows: "Because the juror Michael Mathews did not fully, fairly, and truthfully answer the questions propounded to him on his *voir dire*, as is shown by the affidavits attached hereto of John T. Fish, Charles E. Lester, and George B. McMillan." The motion was granted, on the terms that the defendant pay the costs of the trial. It is stated in the order granting a new trial that "the same is hereby granted for the reason that Michael Mathews, one of the jurors who participated in the trial of said action, was guilty of misconduct on said trial in not fully, fairly, and truthfully answering the questions propounded to him on his *voir dire*, and was not an impartial juror." The plaintiff appeals from the order granting a new trial, and the defendant railway company appeals from that portion of such order which requires it to pay costs of the trial.

For the plaintiff there were briefs by *Gardner & Gaynor*, attorneys, and *Geo. L. Williams*, of counsel, and oral argument by *Geo. R. Gardner*.

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For the defendant there were briefs by *C. H. Van Alstine*, attorney, and *John T. Fish*, of counsel, and oral argument by *Mr. Fish*.

LYON, C. J. 1. The motion for a new trial is based upon the minutes of the court, and certain affidavits are referred to therein which were attached to and served with the motion. Such affidavits are in the record returned to this court. There is no bill of exceptions in the case, and nothing whatever in the record to show what papers were used on the hearing of the motion. We can only presume that inasmuch as the motion was founded on the minutes of the court, and certain affidavits are referred to in the motion and were served therewith, such minutes and affidavits were used on the hearing and are the basis of the order granting the motion. But these minutes are not here, and hence, should the court be of the opinion that the affidavits, considered by themselves, do not sufficiently establish the alleged misconduct of the juror as found by the circuit court, still this court cannot say that the minutes do not clearly show such misconduct and want of impartiality on the part of the juror. For that reason we cannot properly disturb the order founded upon the existence of such misconduct and want of impartiality. It is too well settled to admit of discussion that an appellate court will not review findings of fact unless it has before it all the testimony upon which the findings were made. The order in question rests upon a finding of fact which, if true, justifies the order, and the record shows affirmatively that all the proofs on which the finding is made have not been returned to this court. All that we can do is to presume that such proofs are sufficient to support the order.

2. On the appeal of the railway company it need only be said that the misconduct of a juror in the particular mentioned in the order does not of itself render the verdict of

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the whole jury a perverse verdict, or bring the case within any of the exceptions to the general rule that a new trial should be granted only on the terms that the moving party pay the costs of the former trial. *Schraer v. Stefan*, 80 Wis. 653, and cases cited. Those exceptions are stated in the above case to be when the verdict is perverse or entirely unsupported by evidence, or in which the court has misdirected the jury as to the law of the case. It should be observed there is no claim that the plaintiff was responsible for the misconduct of the juror. Had he been responsible therefor, or in any manner connected therewith, the case might and probably would furnish another exception to the general rule just stated in respect to costs. The new trial was really granted by the court, not as matter of strict right, but in the exercise of its sound discretion, and the case is within the general rule above stated in respect to costs.

By the Court.— The order of the circuit court is affirmed on both appeals.

BAKER, Plaintiff in error, vs. THE STATE, Defendant in error.

November 11 — November 28, 1893.

Mandamus *to compel decision of motion: Criminal law: Appointment of counsel for defendant.*

1. *Mandamus* will not lie to compel a circuit judge to decide a motion, where there has been no refusal to decide and no such delay that a refusal can fairly be inferred.
2. The defendant in a criminal case may have whatever counsel he chooses to retain, and may refuse the services of any other; but if he would be defended at the expense of the county he must accept the services of any reputable attorney whom the court, in its discretion, may see fit to appoint.

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MOTION for a Writ of *Mandamus*.

The record herein having been remitted to the circuit court for Ashland county, to be returned to this court when a bill of exceptions should be settled in the case, with such bill attached thereto, and this court having declined to appoint counsel for plaintiff in error to prosecute his writ of error (84 Wis. 584) the circuit court made an order appointing W. W. O'Keefe, Esq., of Ashland, an attorney of this court, to settle a bill of exceptions and to prosecute such writ of error in this court at the expense of the county of Ashland.

During the month of September last, a motion, founded on a verified petition of plaintiff in error and an affidavit of Rublee A. Cole, was submitted to the circuit court, praying that such appointment of Mr. O'Keefe be vacated and said Cole appointed instead to perform the same service at the expense of the county. In his petition the petitioner substantially declines to be represented in the cause by O'Keefe or by any attorney other than Mr. Cole.

Plaintiff in error, by Mr. Cole, his attorney, now moves this court to send its writ of *mandamus* to Judge PARISH, requiring him to decide such motion, and shows in support thereof that the circuit court had not decided the same up to November 10, 1893. He further asks that, if the motion for a *mandamus* is denied, the clerk of the circuit court of Ashland county be directed to return the record to this court.

Rublee A. Cole, for the plaintiff in error.

LYON, C. J. The motion for a *mandamus* must be denied. The circuit court has not refused to decide the motion for a change of attorneys to prosecute the writ of error in this court at the cost of the county. Neither has it delayed to decide such motion so long that a refusal to decide it can fairly be inferred therefrom. The motion is pending, and

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doubtless will be decided in due course of procedure in that court. At least such is the presumption, and it is not repelled by anything we find in the motion papers presented to this court. No *mandamus* can properly issue in such a case.

Mr. Cole will be recognized by this court as the attorney for the plaintiff in error, and should be so recognized by the circuit court in the matter of settling a bill of exceptions and giving direction for the return of the record to this court. But his services will not become a legal charge against the county unless the circuit court shall, in its discretion, grant the pending motion.

By the Court.— Motion denied.

NOTE.— Since the above was written, Mr. Cole has filed in this court an additional affidavit and copy of an order, from which it appears that on November 16th the circuit court of Ashland county decided the motion in question, and made an order denying the same. Mr. Cole still urges, however, that such order is an abuse of the discretion of the court in the premises, and that a *mandamus* to correct such abuse should issue, notwithstanding the motion has been decided. We do not think the denial of the motion is an abuse of discretion. Counsel seems to think that, by refusing to have Mr. O'Keefe or any one else except Mr. Cole as his counsel, plaintiff in error can coerce the court to appoint the latter to defend him at the expense of the county. This is a mistake. He may have whatever counsel he chooses to retain, and may refuse to accept the services of any counsel he does not want, but if he would be defended at the expense of the county he must accept the services of any reputable attorney the court, in its discretion, sees fit to appoint to perform that duty.

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CAMERON, Appellant, vs. MOUNT, Respondent.

November 13 — November 28, 1893.

(1) *False representations: Warranty: Knowledge of falsity: Action, tort or contract?* (2) *New trial: Terms.*

1. The complaint alleged that plaintiff's husband wished to buy a kind and gentle road horse for her; that defendant offered him a horse and warranted to the plaintiff that such horse was kind and gentle and free from any tricks and bad habits and was perfectly safe for a lady to drive, and invited her to get into his buggy and drive the horse; that plaintiff, relying on said representations and warranty, got into the buggy to try the horse, and after driving a short distance attempted to turn around, when the horse plunged and reared and upset the buggy, injuring plaintiff; and that in truth the horse was an ugly and vicious animal. *Held*, that the action was in tort, and that it was not necessary to allege or prove that defendant knew the falsity of said representations and warranty.
2. Where the reasons for granting a new trial are not stated in the order, it should impose as terms the payment of the taxable costs of the former trial.

APPEAL from the Circuit Court for *Walworth* County.

The facts are stated in the opinion.

For the appellant there were briefs by *Ryan & Merton*, and oral argument by *E. Merton*.

Warham Parks, for the respondent, contended, *inter alia*, that a warranty must be one of the terms of a contract of sale; that it must be upon consideration; that there can be no warranty that is not a contract; and that it must be entered into and accepted by both parties as an agreement between them. *Hogins v. Plympton*, 28 Mass. 97; *Spalding v. Conant*, 146 id. 292; *White v. Stelloh*, 74 Wis. 438; *Hopkins v. Tanqueray*, 26 Eng. L. & Eq. 254, 15 C. B. 130; Parsons, Cont. (7th ed.), 621; *Congar v. Chamberlain*, 14 Wis. 258; *Morehouse v. Comstock*, 42 id. 626; *Collett v. Weed*, 68 id. 428; *Barker v. Cleveland*, 19 Mich. 230; Benj. Sales (2d ed.), 748. A verdict for defendant should have been

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directed because it was not shown that there was any contract of warranty, and because no deceit was practiced upon plaintiff by defendant. *Windle v. Jordan*, 75 Me. 149; *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699; *Ingalls v. Bills*, 50 Mass. 1, 43 Am. Dec. 346, 355; 2 Shearm. & Redf. Neg. sec. 494; *Case v. Stevens*, 137 Mass. 551; *Allen v. Truesdell*, 135 id. 77; *Pierce v. Carey*, 37 Wis. 232; *Dowling v. Lawrence*, 58 id. 282; Hilliard, Torts (3d ed.), 34; Sackett, Inst. to Jur. 147; *Walker v. Hough*, 59 Ill. 375. Counsel also cited authorities to the point that in case of injuries by domestic animals knowledge by the owner of their viciousness must be alleged and proved.

ORTON, J. The complaint states the following case: The plaintiff's husband, Claude N. Cameron, wished to buy a kind and gentle road horse for his wife to drive. The defendant called upon the said Claude N. Cameron, and told him that he had been informed he wished to buy a horse for his wife, and that he had with him a kind, gentle, and safe horse, to sell; whereupon the said Claude called his wife, the plaintiff, to look at the horse, and she came and looked at him and asked the defendant if the horse was kind and gentle and free from any bad tricks and habits. The defendant then and there represented and *warranted* to the plaintiff that said horse was kind and gentle and free from any tricks and bad habits, and that he was perfectly *safe* and well calculated for a lady to drive, and invited her to get in his buggy and drive the horse herself. The plaintiff, relying on said representations and *warranty*, got into the buggy to drive the horse to try him, and after driving a short distance she attempted to turn around, and the horse made a sudden plunge, reared up, and kicked and upset the buggy, and the plaintiff was thrown violently to the ground, and permanently injured in her spine, and bruised and injured in other places on her body, to her

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damage of $3,000. In truth and fact the horse was an ugly, vicious, and tricky animal, and not a safe driving horse, and entirely unsuitable for a lady to drive or manage.

On the trial of the action the facts stated in the complaint were substantially established by the testimony of the plaintiff and her witnesses, and the jury found a special verdict in her favor, and her damages at $3,000. The defendant made a motion for a new trial, based on several grounds, and especially on the ground that the complaint did not state a cause of action. The court granted the motion, but without stating any grounds therefor, and without terms. The plaintiff has appealed from this order.

The briefs and arguments of counsel on both sides go to the question of the sufficiency of the complaint, it not being alleged therein that the defendant knew at the time he made the said representation and warranty that they were untrue. There was no *scienter* alleged in the complaint. The learned counsel seem to be of the opinion that this deficiency of the complaint was the real ground for the granting of a new trial. The jury found specially that the defendant knew that the representations and warranty were false, but it is conceded that there was no evidence to sustain such a finding. The learned counsel of the appellant contend that this was not a good ground for ordering a new trial of the action, and, on the other hand, the learned counsel of the respondent contend that this reason was not only sufficient for ordering a new trial, but that the plaintiff cannot recover without such an averment and proof of a *scienter*. There seemed to be great doubt on the trial, as well as here, whether the action is in tort or on contract. We are inclined to hold that such an averment and proof are not necessary to sustain the action, and that the action is in tort. The representations and warranty set out in the complaint are not strictly and tech-

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nically a "warranty," as in sales of personal property. If they were, no one would contend that it would be necessary to prove that the defendant knew that the facts or conditions embraced therein did not exist or were not true, and the action would be on contract. On such a warranty the law is well settled. But, nevertheless, they do constitute a *warranty* of the facts and conditions embraced therein as effectually, and are an assurance and engagement just as positive and absolute, as a technical warranty. To sustain an action on such a warranty there is no more necessity of proof that the defendant knew that his statement was false than in the other case of a warranty. The action on a warranty in the sale of personal property is on contract. The action on a warranty relating to other matters or transactions is in tort, and the warranty is a constructive fraud, like a false representation.

The learned counsel of the respondent contends that no warranty, as such, can exist except in relation to sales. To show that a warranty may exist in its strictness, so far as to dispense with proof that the defendant knew its falsity, with respect to other matters than sales, and to illustrate the principle, the case of *Kuehn v. Wilson*, 13 Wis. 104, may be referred to. The defendant, as a *farrier*, treated the plaintiff's colt, and "warranted the colt would get well and do well," and it died within a short time thereafter without any fault of the plaintiff. Mr. Justice Cole said in the opinion: "An express warranty that the colt would get well would be an absolute engagement to make good the loss if the colt died. The warrantor would take the chances and hazards," etc. Here there is a *warranty* that the horse was perfectly safe and well calculated for a lady to drive, and that he was kind and gentle and had no tricks or bad habits, and the same "absolute engagement to make good the loss" or damage if the horse was not perfectly safe and well calculated for a lady to drive, and "the war-

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rantor took the chances and hazards" of the experiment. Such warranties constitute a class of frauds, exceptional to the common cases of mere false representations, where an intent to defraud and a knowledge that they were false must be proved. It is an absolute and unconditional engagement to make good the loss.

The following is a terse and yet comprehensive statement of the law governing this kind of warranty, taken from *Gregory v. Schoenell*, 55 Ind. 101, found in a note to 8 Am. & Eng. Ency. of Law, 793: "The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, *the truth of which he assumes to know* and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. In such a case the law holds a party *bound to know* the truth of his representations." "Whoever pretends to positive knowledge of a particular fact when he does not know it, and represents such fact to be true in order that another may rely upon it and act upon it, and does rely and act upon it, and damages flow from the false representation, the person making it is guilty of wilful deception and fraud." "If he affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud." "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it is done to procure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to *warrant* his own belief of the truth of that which he asserts." "A reckless statement, made without caring whether it is true or false, is actionable." "In such cases it is not necessary to prove that the defendant knew that the representation was not true." These extracts are taken from the following cases,

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in which it is held that it is immaterial whether the defendant knew the falsity of the express and positive statement which he has made, and upon which another has relied and acted to his injury: *Taylor v. Ashton*, 11 Mees. & W. 415; *Smout v. Ilbery*, 10 Mees. & W. 10; *Pawson v. Watson*, Cowp. 788; *Pulsford v. Richards*, 17 Beav. 94; *Haycraft v. Creasy*, 2 East, 103; *Evans v. Edmonds*, 13 C. B. 786; *Burrowes v. Lock*, 10 Ves. 470; *Pasley v. Freeman*, 3 Term R. 51; *Milne v. Marwood*, 15 C. B. 778; Add. Torts, 738, 739.

It has been the doctrine of the English courts a long time that when the representation is so positive and absolute as to have the force of an express warranty it is immaterial whether the defendant knew it to be false or not. The representations and warranty in this case have all the accompanying ingredients to make it an actionable fraud. The defendant invited and induced the plaintiff to drive the horse, and she did so, relying upon his representation and warranty that it was perfectly safe for her to do so, and his other assurances of the gentle character of the animal. The defendant was interested in inducing the plaintiff to drive the horse, so that, if it should happen in this instance that the horse should not exhibit any of his unruly and dangerous habits, he might sell him to the plaintiff's husband; and the plaintiff was also interested in the trial, so that she might have a gentle and safe horse to drive. The defendant assumed all the risks and hazards of the trial, and the plaintiff staked her personal safety on the truth of his representations and warranty, and her severe and permanent injuries were the proximate consequences. This is a very strong case for the application of the principle of the law of warranty. The defendant made his statements as of his own actual knowledge, and the plaintiff had no knowledge of the horse or his habits. There is nothing wanting in the case to make the defendant liable.

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according to the authorities, if the complaint is sustained by the evidence.

The case should be tried on the true theory of what the action is, and on a correct view of the law that governs it; and there seems to have been great doubt upon the subject at the former trial. Not knowing from the order granting a new trial the grounds of it, this court cannot say that it was an abuse of the discretion of the circuit court to grant it. It would seem to be very proper, under the circumstances, that the action should be tried again. The order is erroneous in not having been made on the terms of the defendant paying all the taxable costs of the former trial. In the absence of any stated grounds for the order, the presumption is that it was made on the ground that the verdict is against the weight of the evidence, or on the merits; and in such case the order should have been made on such terms. *Garny v. Katz*, *ante*, p. 321; *Pound v. Roan*, 45 Wis. 129; *Smith v. Lander*, 48 Wis. 587; *Schraer v. Stefan*, 80 Wis. 653.

By the Court.— The order of the circuit court is reversed, and the cause remanded with direction to grant a new trial therein on the terms of the defendant paying all the taxable costs of the former trial.

HART, Respondent, vs. WEST SIDE RAILROAD COMPANY, Appellant.

November 13 — November 28, 1893.

Street railways: Ejection of boy from platform: Liability for injuries: Volunteer fellow-servants: Special verdict: Findings by court on undisputed evidence.

1. It was found by a special verdict that plaintiff, with other boys, got upon the front platform of an electric car by invitation of the motorman; that the conductor did not warn them off until after

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the car was in motion, and that he then used some force, either with hand or foot, whereby plaintiff was caused to fall from the car; that the wheels of the car crushed plaintiff's arm; that plaintiff was about eleven years old and, under all the circumstances, was not guilty of negligence proximately contributing to the injury; and that he sustained damage to a certain amount. The complaint had alleged that when plaintiff fell from the car it was going at a high rate of speed; and it was recited and found by the court, in the order for judgment and in the judgment, that all the allegations of fact in the complaint, beyond those covered by the special verdict, had been proved to be true by the undisputed evidence. *Held*, that the facts so found by the court will be treated as verities, in the absence of a bill of exceptions containing the evidence, and that the verdict, supplemented by such finding, is sufficient.

2. If plaintiff is to be regarded as a passenger on the car, his forcible ejection therefrom, under the circumstances found, rendered the defendant liable.

3. The complaint alleged that the car was in charge of a motorman on the front platform and a conductor; that it was a custom of the motormen on defendant's cars to permit boys of plaintiff's age to ride on the front platforms to a certain switch, "for the purpose of inducing such boys to turn said switch for said employees;" that on the occasion in question the plaintiff, with the permission of the motorman "and in pursuance of the custom" mentioned, got upon the front platform of the car for the purpose of riding to said switch. *Held*, that these allegations did not show any purpose of plaintiff to aid in operating defendant's railway such as would make him a volunteer fellow-servant of the conductor.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint alleges, in effect, that the plaintiff is an infant and brings this action by his guardian duly appointed as such; that the defendant is a corporation, duly organized and engaged in the carrying of passengers for hire in the public streets of Milwaukee on cars propelled by electricity, and was doing so January 21, 1892, on Grand avenue, Eleventh and Wells streets; that the car in question was on that day provided with but one gate for the front platform thereof, and that on the inner or right hand side of said platform there was no gate or wicket or barrier of any

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kind; that the car was at the time mentioned in charge of, and being operated by, two servants of the company, to wit, a motorman stationed on the front platform, and a conductor named Boyle; that it had been for a long time prior thereto the habit and custom of the motormen on said line to permit young boys of about the age of the plaintiff to go upon the cars, and to ride on the front platforms thereof and the steps leading thereto to a switch at the corner of Wells and Eleventh streets, *for the purpose of inducing such boys to turn said switch* for said employees; that about 1 o'clock in the afternoon of January 21, 1892, and while the car mentioned was stopped at the intersection of Grand avenue and Eleventh street for the purpose of permitting passengers to alight therefrom, the plaintiff, with the permission and consent of the motorman of said car, and in pursuance of the custom mentioned, stepped and stood upon the lower step of the front platform of said car, and held firmly to the rails at the sides of said platform, for the purpose of riding to said switch; that when the car, so conducted and operated, was moving at a high rate of speed on Eleventh street, at about the middle of the block between Grand avenue and Wells street, and while the plaintiff was lawfully upon the front platform thereof, the conductor of the car suddenly and without warning threw open the front door of the car and, without stopping the car or giving the plaintiff an opportunity to safely alight therefrom, in a violent and threatening manner ordered the plaintiff to get off the car, and at the same time kicked at the plaintiff, striking him on the shoulder, whereby the plaintiff was caused to lose his balance and relax his hold upon the rails of the car, and plaintiff without any fault or negligence on his part was by the said acts of the conductor hurled and thrown to the ground and underneath the wheels of the car, which ran over his right arm, and cut, bruised, and mangled the same, and broke and crushed the

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bones thereof so that the same protruded through the flesh, and bruised and injured the body and limbs of the plaintiff, whereby his right arm was necessarily amputated, to his damage in the sum of $15,000, for which he prayed judgment.

The defendant answered by way of admissions and denials, and alleged in effect that the plaintiff, at the time averred, carelessly and recklessly, without invitation, but acting upon his own impulse, unlawfully attempted to board the car mentioned for the purpose of clinging to the same and riding a short distance without paying fare, and in so doing, by his own fault and negligence, fell off the car and was injured.

At the close of the trial the jury returned a special verdict to the effect (1) that the plaintiff on January 21, 1892, sustained a personal bodily injury by having his arm crushed under the wheels of a street car, which resulted in the loss of his arm; (2) that the plaintiff, with three other boys, did go upon the car upon the invitation of the motorman, express or implied, at or near the intersection of Eleventh street and Grand avenue, in the city of Milwaukee; (3) that the conductor did not warn the plaintiff and said boys not to go upon the car, before they went upon the same; (5) that he did so warn them to leave the car, from his position on the rear platform, after the car was in motion; (6) that the conductor did pass through the car, from the rear to the front, and go upon the front platform, before the plaintiff fell from said car; (7) that the conductor ordered the boys off the front platform and the step leading thereto, before the plaintiff fell; (8) that the conductor used force, either with his hand or foot, whereby the plaintiff was caused to lose his hold and fall from said car; (9) that the boys, including the plaintiff, did not go upon the car without leave after the same was in motion; (10) that the plaintiff's age, at the time of his injury, was about ten years

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and ten months; (11) that the plaintiff was not guilty of contributory negligence, the proximate cause of, or which contributed proximately to, his injury, taking into account his age and all the facts and circumstances of the case; (12) that the jury assessed the plaintiff's damages at $8,500.

The trial court, by order, denied a motion made by the defendant, based on the pleadings and special verdict, for judgment dismissing the complaint and for costs of the action, February 11, 1893. Upon the same day, and upon the motion of the plaintiff, the court ordered judgment to be entered in favor of the plaintiff and against the defendant for said sum of $8,500 and the costs of the action. Said last-named order recited, among other things, the rendition of said verdict, and that "all of the allegations of fact in the complaint herein, beyond those covered by the said special verdict, having been proven to be true by the undisputed evidence on the trial." Judgment was thereupon entered accordingly, reciting, among other things, that "all the allegations of fact in the complaint herein, beyond those covered by the special verdict, having been proved to be true by the undisputed evidence on the trial." From each of said orders and said judgment the defendant appeals.

For the appellant there was a brief by *Danforth Becker*, attorney, and *W. J. Turner*, of counsel, and a supplemental brief by *Danforth Becker*, attorney, and *Charles N. Gregory*, of counsel, and the cause was argued orally by *Mr. Turner* and *Mr. Gregory*. They contended, *inter alia*, that one assisting servants in their work, voluntarily or by their request, stands in no better place as to recovery from the master for personal injury than the servants he assists. *Potter v. Faulkner*, 1 Best & S. 800, 806; *Degg v. Midland R. Co.* 1 Hurl. & N. 773; *Osborne v. K. & L. R. Co.* 68 Me. 49; *Mayton v. T. & P. R. Co.* 63 Tex. 77; *Everhart v. T. H. & I. R. Co.* 78 Ind. 292; *Street R. Co. v. Bolton*, 43 Ohio

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St. 226–7; *Kirk v. A. & C. A. L. R. Co.* 94 N. C. 625, 25 Am. & Eng. R. Cas. 507; *Flower v. Penn. R. Co.* 69 Pa. St. 210; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; Wood, M. & S. (2d ed.), 909, 910; 1 Beven, Neg. 406–408; Whart. Neg. (2d ed.), §§ 200, 201, 224; Shearm. & Redf. Neg. (3d ed.), § 106; 2 Thomp. Neg. 1045; MacDonald, M. & S. 314, 315; Ewell's Evans, Agency, 682; *Johnson v. Ashland W. Co.* 71 Wis. 553, 556; *Finley v. H. E. R. Co.* 64 Hun, 373; *Fleming v. B. C. R. Co.* 1 Abb. N. C. 433, 74 N. Y. 618. The rule that the master is not liable for injury through fault of a fellow-servant has been habitually applied to cases of injury to infant servants exactly as to adults, both in England and America. *Flower v. Penn. R. Co.* 69 Pa. St. 210; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Hall v. Johnson*, 3 Hurl. & C. 589; *Murphy v. Smith*, 115 Eng. C. L. 361; *Brown v. Maxwell*, 6 Hill, 592; *King v. B. & W. R. Corp.* 9 Cush. 112; *Curran v. Merchants' M. Co.* 130 Mass. 374; *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. T., W. & W. R. Co.* 58 id. 26; *Gartland v. T., W. & W. R. Co.* 67 Ill. 498; *Fisk v. C. P. R. Co.* 72 Cal. 38, 42; *North Chicago R. M. Co. v. Benson*, 18 Ill. App. 194; Pierce, Railroads, 360, and note 8; McKinney, Fellow Servants, 51; *Toner v. C., M. & St. P. R. Co.* 69 Wis. 188; Whart. Neg. (2d ed.), §§ 200, 224; 2 Thomp. Neg. 977.

For the respondent there were briefs signed by *Quarles, Spence, Hoyt & Quarles*, attorneys, and *J. V. Quarles*, of counsel, and oral argument by *J. V. Quarles*. They argued, among other things, that if the act of the conductor was wrongful and was done while he was engaged in the discharge of his appointed duty, the company is liable for the wrong of its agent without regard to the question of negligence. *Fick v. C. & N. W. R. Co.* 68 Wis. 471; *Rogahn v. Moore M. & F. Co.* 79 id. 574; *Lovett v. S. & S. D. R. Co.* 9 Allen, 557; *Kansas City, F. S. & G. R. Co. v. Kelley*, 36

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Kan. 655; *Wabash R. Co. v. Savage*, 110 Ind. 156; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; *Kline v. C. P. R. Co.* 37 Cal. 405; *Biddle v. H., M. & F. P. R. Co.* 112 Pa. St. 551; *Hestonville, M. & F. P. R. Co. v. Biddle*, 16 Atl. Rep. 488. That plaintiff was not a trespasser, see *Wilton v. Middlesex R. Co.* 107 Mass. 108; *S. C.* 125 id. 130; *Powers v. B. & M. R. Co.* 153 id. 190.

CASSODAY, J. There is no bill of exceptions. This being so, the questions presented must be determined upon the pleadings, the special verdict, orders, and judgment mentioned in the foregoing statement. It is contended, in effect, that the *gravamen* of the complaint is the negligence of the defendant; that the same is put in issue by the answer; and that such issue has not been determined by the special verdict, and hence that the verdict is defective. Undoubtedly a special verdict is defective which fails to determine all the material and controverted facts put in issue by the pleadings. It is equally true that the form of such verdict is very much in the discretion of the trial court, and that it is not to be regarded as defective merely because such court fails to submit questions not in issue, or not material, or not controverted because admitted upon the trial or established by the undisputed evidence. *Heddles v. C. & N. W. R. Co.* 74 Wis. 257; *Sherman v. Menominee R. L. Co.* 77 Wis. 22; *Montreal R. L. Co. v. Mihills*, 80 Wis. 551.

This court has repeatedly sanctioned the propositions apparently contended for by counsel for the defendant, to the effect that, as a *general rule*, negligence is to be deduced as an inference of fact from several facts and circumstances disclosed by the evidence, after their connection and relation to the matter in issue have been traced and their weight and force considered; that in one sense it is a quality attaching to acts dependent upon and arising out of the

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duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations. *Hill v. Fond du Lac*, 56 Wis. 246; *Kaples v. Orth*, 61 Wis. 533, and cases there cited. When such facts and circumstances, though undisputed, are ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury. *Ibid.* But when such facts and circumstances are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the court may take the case from the jury. *Ibid.* The same rules are applicable to questions of contributory negligence. *Hoth v. Peters*, 55 Wis. 410, and cases there cited. *Hoye v. C. & N. W. R. o* 62 Wis. 672, 67 Wis. 15.

In the case at bar the act complained of is not the mere neglect or failure to perform a duty imposed by law under a given state of facts and circumstances, but consisted in forcibly and intentionally ejecting the plaintiff from the car, under the facts and circumstances found. It appears from the special verdict that the plaintiff was warned to leave the car *after* it was in motion and before he was ejected, but it does not specifically appear therefrom that the plaintiff was so ejected while the car was moving at a high rate of speed. As indicated in the statement of the case, the complaint so alleges, and in the order for judgment and the judgment the trial court finds that all the allegations of fact in the complaint, beyond those covered by the special verdict, had been proved to be true by the undisputed evidence upon the trial. If such facts were so established by the undisputed evidence, then the court was not required to submit them to the jury; and we perceive no necessity or propriety in having a bill of exceptions for the mere purpose of showing such undisputed facts, when they can

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just as well, and much better, be made to appear as in the case at bar. We must therefore regard the facts so found from the undisputed evidence as verities in the case.

Thus it appears affirmatively in the record that the plaintiff was forcibly ejected from the car by the conductor while the same was running at a high rate of speed. That such act of the conductor is highly culpable is frankly conceded. This court has recently sanctioned the direction of a verdict in favor of the plaintiff, where it appeared from the undisputed evidence that he was wrongfully ejected from the train. *Phettiplace v. N. P. R. Co.* 84 Wis. 412. Upon the same principle, it has been held, as a matter of law, that where it appears from the undisputed evidence that a passenger voluntarily and unnecessarily jumps from a rapidly moving train, and is thereby injured, he cannot recover damages therefor against the railway company. *Jewell v. C., St. P., M. & O. R. Co.* 54 Wis. 610; *Brown v. C., M. & St. P. R. Co.* 80 Wis. 162. It follows from what has been said that, if the plaintiff is to be regarded as a passenger upon the car, then the fact that he was forcibly ejected therefrom as indicated would, as a matter of law, render the defendant liable therefor in damages.

The plaintiff was, at the time of the accident, less than eleven years of age. He got upon the car by the invitation of the motorman. He was therefore not a trespasser, but lawfully upon the car. This being so, the defendant was charged with the exercise of ordinary care towards him while he so remained upon the car, unless it was relieved therefrom by reason of his peculiar relation to the company and those in charge of the car. The contention is that the complaint states no cause of action; that its allegations are to the effect that the plaintiff got upon the car by the invitation of the motorman, to assist him in his work and "to aid in operating the street railway, as a volunteer or an invited assistant to the motorman," and hence that he must be regarded, *pro illa vice*, as the co-employee of the con-

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ductor and motorman, and hence that the defendant cannot be held liable for the conductor's misconduct toward him. In support of such contention counsel cites numerous adjudications, and in some of them such volunteer or assistant co-employee was an infant. Assuming that one who, at the request of those in charge of an electric car, temporarily assists in the operation of such car, is to be regarded for the time being as the servant of the company and the co-employee of those so in charge of the car, still we are constrained to hold that the complaint in the case at bar fails to allege any such relationship. The substance of the complaint is set forth in the foregoing statement. It is not alleged and nowhere appears that the plaintiff had any knowledge of any habit or custom of the motormen to permit boys to ride to the switch for the purpose of turning the same or for any other purpose, nor is it alleged that the plaintiff ever rode upon such car or cars for any such purpose, or at all, nor that he ever turned or aided in turning the switch or operating the car, nor that he got upon the car at the time in question for the purpose of turning or aiding in turning the switch mentioned or any switch or in operating the car. The allegations of the complaint upon the subject all relate to the habit, custom, conduct, and purpose of the motorman and the motormen, except that the plaintiff, with the permission and consent of the motorman and in pursuance of the custom mentioned, got upon the lower step of the front platform for the purpose of riding to the switch. The manifest import of the complaint is that such motormen indulged in such habit and custom of permitting young boys to so ride upon cars "for the purpose of *inducing* such boys to turn said switch" after having reached the same or during the passage to the same. We must hold that the rule contended for has no application to the facts presented by this record.

By the Court.—The several orders and judgment of the circuit court are affirmed.

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CHANDOS, Administrator, Appellant, vs. EDWARDS and another, Executors, Respondents.

November 13 — November 28, 1893.

Pleading: Action by administrator: Correction of clerical error.

In an action by an administrator upon a cause of action which accrued to his intestate and her estate, the complaint by mistake alleged that defendant was indebted to "plaintiff" for services performed by "plaintiff" in storing logs in the booms of "plaintiff." The mistake was apparent, and defendant was not misled but answered the complaint as it was obviously meant. *Held*, that the mistake should have been disregarded on the trial or corrected as of course and without terms or delay.

APPEAL from the Circuit Court for *Wood* County.

Action to recover for services in storing logs in the booms of plaintiff's intestate. Pending the action the defendant died and his executors were substituted as defendants. Plaintiff appeals from a judgment of nonsuit.

H. W. Remington, for the appellant.

For the respondents there was a brief by *Gardner & Gaynor*, attorneys, and *B. R. Goggins*, of counsel, and oral argument by *Geo. R. Gardner*.

ORTON, J. In the complaint the title of the plaintiff is "*B. G. Chandos*, administrator of the estate of Marian L. Bensley, deceased." The jurat is "that he is administrator of the estate of Marian L. Bensley, deceased, *the plaintiff in this action*," etc. The complaint states "that the defendant is indebted to the *plaintiff* for work, labor, and services done and performed by said *plaintiff*," etc., "in turning in, securing, storing, and safely keeping a large quantity of pine saw logs in the storage pond or room within the booms of this said *plaintiff*, situated in the city of Centralia," etc. The answer admits that the plaintiff is

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administrator as alleged, and alleges that the defendant and his partner were driving and floating logs past the storage ponds and booms "*of said Marian L. Bensley, mentioned in the complaint.*" They "never requested said Marian L. Bensley to take said logs into, or store or hold the same in, said storage pond," etc. They "are informed and believe that said Marian L. Bensley died December 30, 1889;" and the defendant then pleads the statute of limitations to the cause of action.

On the trial the plaintiff commenced to read the deposition of Edward McMahon, and read the third interrogatory asking the witness if he knew of Marian L. Bensley owning or having under her possession or control in the city of Centralia booms and a pond for securing and storage of saw logs during the years 1884 and 1885. The counsel of the defendant thereupon objected to any testimony under the complaint on the ground that this is an action in favor of *B. G. Chandos* as an individual and not as administrator. The plaintiff's counsel asked leave to amend the complaint in two places by inserting the words "Marian L. Bensley" in the place and stead of the word "plaintiff." The defendant objected to the amendment. The court said: "I do not think the law will permit an amendment. The case may go on on the complaint, as I interpret it to mean a cause of action against the defendant in favor of *Mr. Chandos* as an individual and not as administrator of Marian L. Bensley." The attorney of the plaintiff said: "Our case is in favor of the administrator of Marian L. Bensley." The court ordered a nonsuit. A motion for a new trial was overruled, and judgment for nonsuit and for costs was rendered.

It does not require a very liberal construction of the complaint for any one to understand that by the word "plaintiff" in those two places is meant Marian L. Bensley, deceased. Such meaning is obvious from the complaint itself. The

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plaintiff sues as administrator of the estate of Marian L. Bensley, deceased, and on a cause of action which accrued to her and her estate. The mistake is a mere slip of the pen. Could any one understand that *Chandos* owned the booms and performed the service? The defendant certainly understood that Marian L. Bensley owned the booms and performed the service at the city of Centralia in 1884 and 1885, and that such was the action. The answer admits that she owned the booms where the logs of the defendant were stored, and charges her with negligence in not preventing their logs from entering her booms, and in not making a sufficient boom to guide them down the river, and that the defendant removed them as soon as reasonable,—November 1, 1884. And the defendant alleges "that the foregoing *is the same transaction set forth in said complaint.*" The answer admits that Marian L. Bensley died in 1889, so that *Chandos* could not have been personally interested in these services. The answer admits that he and his partner "were floating logs past the storage ponds and booms of said Marian L. Bensley, *mentioned in the complaint.*" The defendant was not misled or deceived, and he answered the complaint as he understood it meant. The mistake was a very trifling one, and quite immaterial, for it did not and could not destroy or affect the sense or substance of the complaint, and should have been disregarded or corrected as of course and without terms or delay. The answer makes the correction, if any was necessary.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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KING, Respondent, vs. RANSOM and another, imp., Appellants.

November 13 — November 28, 1893.

Lease of chattels: Termination: Sale by lessor: Taking of property.

A lease of chattels provided that in case of a sale of the property by the lessor at any time during the term of the lease he should forfeit to the lessee a certain sum as damages. The lessee was in default in payment of rent, and the lessor sold the property and demanded possession, tendering to the lessee the stipulated sum, which was refused. *Held*, that the lease implied an agreement that the lessor might terminate it at any time by a sale, and that the lessee was not entitled to damages for the taking of the property by the lessor and his vendee.

APPEAL from the Circuit Court for *Waupaca* County.

On September 3, 1890, the defendant *F. Cleary* leased to the plaintiff the Times Printing Office, with type, printing material, and furniture, then located in Smith's block in New London, for the term of one year from that date. In and by said lease the plaintiff agreed to pay said *Cleary* for the same $7 per month, quarterly, and pay the taxes on the property, and cause said property to be insured in some suitable company, to be approved by *Cleary*, in the sum of $1,000. The lease also contained a clause to the effect that in case of sale of said property by said *Cleary* at any time during said term he should forfeit to the said King, as damages, the sum of $21; and it was therein stipulated that said property should remain in said building, unless removed by the written consent of *Cleary* or his attorney.

This action was commenced in the spring of 1891, and the complaint alleges, in effect, that March 9, 1891, the defendants wrongfully broke into said printing office and took from his possession the property described in the lease, to the damage of the plaintiff in the sum of $2,000,

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for which he demanded judgment. The defendant *Cleary*, by way of separate answer, alleged in effect that he was the owner of the property described, September 3, 1890; that he had leased the same to the plaintiff on the conditions named; that March 9, 1891, plaintiff having neglected and refused to pay the rent due by the terms of the lease, and on being admitted into the rooms where the property was, he took possession of the same; and also denied each and every allegation of the complaint. The other defendants, including *Ransom*, answered by way of general denials.

At the close of the trial the jury returned a verdict in favor of the plaintiff and against *Ransom* and *Cleary* in the sum of $110, and from the judgment entered thereon the defendants *Ransom* and *Cleary* appeal.

For the appellants there were briefs by *T. L. Cleary*, and oral argument by *Burr W. Jones*.

Charles D. Smith, for the respondent.

CASSODAY, J. At the close of the evidence on the part of the plaintiff the court granted a nonsuit as to all the defendants except *Ransom* and *Cleary*, who were together at the time of taking possession of the property, March 9, 1891. At the close of all the evidence the court directed the jury to return a verdict in favor of the plaintiff and against the defendants *Ransom* and *Cleary* for such damages as they should be satisfied from the evidence that the plaintiff had sustained by reason of their taking and withholding the property described in the lease and mentioned in the foregoing statement. It is undisputed that, prior to their taking such possession, the plaintiff was in default in the payment of the rent, and that *Cleary* had sold the property to the defendants *Ransom* and Johnston, and had demanded possession, and tendered to the plaintiff the $21 mentioned in the lease. Such undisputed evidence was given either on the part of the plaintiff or the defendants

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or both, without objection. The lease in question was before this court in *Johnston v. King*, 83 Wis. 8. It was there held that the clause of the lease mentioned in the foregoing statement implied an agreement that the lessor, *Cleary*, might terminate such lease at any time by the sale of the property therein described. In the event of such termination *Cleary* was therein required to pay to the plaintiff, *King*, $21 as stipulated damages. That amount appears to have been tendered and refused. Such being the facts and the law, it is manifest that the verdict was erroneously directed in favor of the plaintiff. Whether, in rightfully taking possession of the property covered by the lease, *Cleary* and *Ransom* unnecessarily trespassed upon any property or possessions of the plaintiff, as claimed by his counsel, is not presented by this record.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

The State vs. Cone.

November 13 — November 28, 1893.

Marriage: Person under age of consent: Bigamy.

The marriage of a person who, for want of age, is incapable of assenting thereto is not void in this state, but under sec. 2350, R. S., is voidable only by judicial decree.

REPORTED from the Circuit Court for *Racine* County.

Prosecution for bigamy. The defendant, without the consent of his parents, married one Edith S., October 31, 1885, being then fifteen years and two months old. They cohabited together until April, 1886, when they voluntarily separated and have not since lived together. On the 19th day of September, 1891, the defendant married one Sarah

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C., the said Edith being still alive, and no decree of divorce or annulment of the first marriage having been obtained. Upon these facts the defendant was found guilty of bigamy, and upon motion in arrest of judgment the circuit judge certified the above facts to this court, and submits the question, "Can the defendant be legally convicted of bigamy under the above facts?"

For the plaintiff the cause was submitted on the brief of the *Attorney General* and *J. M. Clancey*, Assistant Attorney General.

For the defendant there was a brief by *Hand & Flett*, and oral argument by *E. O. Hand*. They contended, *inter alia*, that at common law marriages between parties when either is under the age of consent may be disaffirmed by the party under such age without a judicial sentence. 1 Bishop, Mar. & Div. secs. 149, 150, 153; Schouler, Dom. Rel. 32; *People v. Slack*, 15 Mich. 193; *People v. Bennett*, 39 id. 208; *Shafher v. State*, 20 Ohio, 1; *McDowell v. Sapp*, 39 Ohio St. 558; *Holtz v. Dick*, 42 id. 23; *McDeed v. McDeed*, 67 Ill. 546. The rule of the common law has not been changed by statute in this state. It could not be repealed by implication, but the intent to repeal it must be clearly expressed. The common law furnishes no method of obtaining a judicial sentence for annulling such a marriage (*Shafher v. State*, 20 Ohio, 7), and secs. 2350–2354, R. S., were passed to provide for such a decree, but not for the purpose of abrogating the common-law rule. *People v. Slack*, 15 Mich. 193. A judicial sentence of nullity is not necessary in case of a void marriage to authorize a person capable of marrying to enter into a second valid marriage. *Patterson v. Gaines*, 6 How. 550; *Gaines v. Relf*, 12 id. 472.

WINSLOW, J. The question is, Was the first marriage void or voidable only? If void, then there was no bigamy; if

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voidable only by the decree of a court of competent jurisdiction, then there was a marriage subsisting until such decree was rendered, albeit an imperfect one. Speaking of such a marriage, it was said by this court in the case of *Eliot v. Eliot*, 77 Wis. 634: "This marriage is not an absolute nullity. It is only annulled from such time as shall be fixed by the judgment of the court. R. S. sec. 2350.[1] That time may, and in many contingencies should, be fixed at a later date than that of the marriage. During the time intervening the marriage is valid." This language was used advisedly, and is supported by the great weight of authority. We see no reason for departing from it now. *Beggs v. State*, 55 Ala. 108, and authorities cited. The case of *Shafher v. State*, 20 Ohio, 1, is an authority to the contrary, but we do not deem it well supported either in reason or authority. It follows that the question submitted must be answered in the affirmative.

By the Court.— Question answered in the affirmative.

[1] R. S. sec. 2350, provides that when either party to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation, "the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof."
—REP.

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NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in error, vs. MCMULLEN, Administratrix, Defendant in error.
NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in error, vs. SEIPP, Administratrix, Defendant in error.

September 27 — December 29, 1893.

Removal of causes: Conflict between federal and state courts: Jurisdiction: Waiver.

1. The decision of a circuit court of the United States that the federal statutes have been complied with for the removal of a cause to that court, is conclusive, and the state court has thereafter no right to decide otherwise and retain jurisdiction of the cause.
2. A party does not waive the right to a removal by answering and defending on the merits in the state court after that court has wrongly refused to order a removal. *First Nat. Bank v. Conway*, 67 Wis. 210, distinguished.

ERROR to the County Court of *Waukesha* County.

The facts are stated in the opinion.

For the plaintiff in error there was a brief by *D. S. Wegg* and *T. H. Gill*, and oral argument by *Mr. Gill.*

T. E. Ryan and *E. Merton*, for the defendants in error, contended, *inter alia*, that the actions could not be removed because the petition and bond were not filed in the county court — in which the actions were pending — within the time required by law. *Noble v. Mass. Ben. Asso.* 48 Fed. Rep. 337; *Kansas City, F. S. & M. R. Co. v. Daughtry*, 138 U. S. 298; *Stewart v. Stewart*, 83 Wis. 364; *Austin v. Gagan*, 39 Fed. Rep. 626; *Burdick v. Hale*, 7 Biss. 96; *Torrey v. Grant Locomotive Works*, 14 Blatchf. 269; *Shedd v. Fuller*, 36 Fed. Rep. 609; *Johnson v. C., M. & St. P. R. Co.* 43 Wis. 431.

The following opinion was filed October 17, 1893:

ORTON, J. These two cases were, by stipulation, tried together and before the same jury, with separate verdicts

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and judgments, and the proceedings for their removal to the circuit court of the United States were upon like records and papers, and were presented to this court upon the same record and assignments of error, and therefore there will be but one opinion for both cases.

These two actions are brought by the administratrix of the estate of each intestate to recover the statutory damages for his killing by the negligence of the defendant company, on its railway, on the night of April 9, 1891, near the village of Waukesha. Daniel McMullen, deceased, one of said intestates, was the engineer, and Peter Seipp, deceased, the other of said intestates, was a brakeman on the same train, and both came to their deaths by the same accident and by the same negligence of the company. The facts, as disclosed by the testimony, need not be further stated. The trials resulted in a judgment in favor of *Mary McMullen*, administratrix, for the sum of $5,358.23, and in favor of *Mary Seipp*, administratrix, for the sum of $5,084.30. The defendant company has brought both of these cases to this court by writs of error.

The first and the most important error assigned by the plaintiff in error is the want of jurisdiction in the county court of the county of Waukesha to try and determine these causes, by reason of their removal to the circuit court of the United States for the eastern district of Wisconsin, and of that court having entertained jurisdiction thereof, according to the laws of the United States in such cases made and provided. All the facts in respect to the applications for such removal may not be necessary to the decision of this question, but inasmuch as the county court denied such applications by the plaintiff in error, and proceeded, notwithstanding, to the trial of these causes, in justice to that court all the facts will be substantially stated, as follows:

The summons and complaint were served on the 27th

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day of July, 1891, and the time within which the defendant must plead, answer, or demur would expire on the 17th day of August, 1891, the 16th falling upon Sunday. The defendant, being a corporation organized and created under and by virtue of an act of the Congress of the United States, was entitled to a removal of said cause for trial from said county court to the circuit court of the United States for the eastern district of Wisconsin, damages claimed in each case being $5,000; and on the 15th day of August, 1891, the defendant's attorneys prepared its petition in due form for such removal therein, accompanied by a bond in proper form, conditioned as required by law, and a notice to the plaintiff's attorneys that an application would thereon be made to said court for an order removing said cause; and on the 25th day of August following filed the same in the clerk's office. By a clerical error in the preparation of said petition, the venue was laid in the *circuit* court for said Waukesha county, instead of in the *county* court; and when it was filed, no other papers in the action having been filed by the plaintiff, the clerk indorsed the same as filed in the circuit court; said clerk being by law clerk of both courts and keeping the records of both courts in his office. Before the same were filed, however, copies of the petition, bond, and notice of motion for removal order were personally served upon the plaintiff's attorneys, and their admission indorsed thereon. On the 25th of August, the said clerical error having been discovered, an order was issued by said county court, returnable at 2 o'clock in the afternoon of said day, requiring the plaintiff to show cause why the word "circuit," in said petition, should not be changed to the word "county," and such clerical error disregarded, so that the said petition might stand as properly entitled in said action. At the return hour of said order the plaintiff's attorneys appeared specially with the objection that such order to show

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cause was irregular and informal, and, after argument, another order to show cause, based on an affidavit to the same effect, was issued, returnable on the 29th day of August, 1891, and served on the plaintiff's attorneys.

Upon the hearing of this order, further affidavits were filed showing that the error in venue was a pure mistake. After argument by the respective counsel, the county court of Waukesha county ordered that, it satisfactorily appearing to the court that the only action then pending in any court between the above-named parties is such action pending in the county court, and that there is no such action pending in the circuit court, and being satisfied that the mistake was simply a clerical error, it was adjudged that the word "circuit," in said removal papers, be changed to read "county," so that the said removal papers should show that they were properly entitled in said action.

By consent of the parties the argument on the motion for the order removing the cause, pursuant to said petition and bond, was taken up on the 5th day of September following, and after a hearing such motion was denied for the reason that the application for removal was not made within the time required by the statutes, and costs were awarded to plaintiff. The defendant, however, procured a certified copy of the record in such case, notwithstanding the refusal of the county court to order the removal, and upon the 5th day of October, 1891, being the first day of the next term of the federal court for the eastern district of Wisconsin succeeding the application for the removal from the county court, presented the same to such federal court; and, after full statement of facts and investigation, the same were therein docketed. An order was also entered in said federal court extending the time to plead, and copies of both such orders served upon plaintiff's attorneys, they not appearing. Thereafter, the plaintiff's attorneys served notice of application to said county court of Wau-

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kesha county on the 19th day of November, 1891, for judgment by default against the defendant; and on that day the defendant appeared by its attorneys specially, and objected to the jurisdiction of said county court for the reason that the said cause had been properly removed therefrom, and filed a certified copy of the order docketing said cause in the federal court. The county court, however, overruled the objection; and, to prevent judgment by default, defendant, upon terms, obtained leave to answer in said action, and duly filed and served its answer herein.

The action of the federal court in taking jurisdiction of these causes on certified copies of the records thereof and proceeding therein, was brought to the attention of the county court by affidavit and by a duly certified copy of the record of said court, by which it appeared that the defendant, on the 5th day of October, 1891, and on the first day of the term, presented to said federal court copies of the process, complaint, and other papers and proceedings in these causes, including the petitions of the defendant for their removal to that court, and of the bond required, and moved the court that said causes be entered and docketed therein, and that said court thereupon ordered that the said copies be filed and that the causes be entered on the law docket and be proceeded with as if they had been commenced therein by original process. That court, therefore, must have considered and decided every question affecting its jurisdiction of these causes by their removal to that court from the county court, including the matter of said mistake, and must have held such mistake to be immaterial or to have been duly corrected. The plaintiff in error not only demanded that the county court transmit the records and papers to said federal court upon this showing, but objected to said county court entertaining any further jurisdiction of these cases and proceeding to the trial thereof. Under such conditions, it cannot be that both the county

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court and the federal court have concurrent jurisdiction in these cases. The county court decided that they had not been properly removed, and the federal court decided that they had been. The question then is, as affecting the legal *status* of these cases, Which court has the superior and exclusive authority to decide this question? This is peculiarly a *federal* question, arising under the laws of the United States. The decision of this question by the federal court must, of necessity, be final; and the county court of Waukesha county, and this court also, must yield to its paramount authority. It is not possible that there can be any irreconcilable conflict of jurisdiction in such a case. It is necessary to the rights of parties litigant, and to the peaceful and harmonious administration of justice, that this should be so. The last and only inquiry of the state court should be whether the federal court has decided the question of its jurisdiction in such a case. The learned counsel of the defendants in error admit in their brief that the plaintiff in error had the right to remove these suits to the federal court by complying with the statutes of the United States. The circuit court of the United States for the eastern district of Wisconsin had decided that the statutes of the United States had been complied with for their removal to that court; and the county court, after that, had no right to decide otherwise and retain jurisdiction over them.

After these suits had been thus entered in the federal court, and that court had taken jurisdiction of them, "the statute made it the duty of the county court to proceed no further until its jurisdiction had been in some way restored. On the face of the record, its jurisdiction had been taken away." *Carson v. Dunham*, 121 U. S. 421.

"When an issue of fact is raised upon a petition for the removal of a cause from a state court to a circuit court of the United States, that issue must be tried in that court."

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Kansas City, F. S. & M. R. Co. v. Daughtry, 138 U. S. 298. It is said in *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 517: "Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the circuit court of the United States."

In *Baltimore & O. R. Co. v. Ford*, 35 Fed. Rep. 170, the federal court, having decided that this case was properly removed, uses the following language: "As we have seen, the case was properly removed from the state court into the federal court; and when removed, the jurisdiction of the state court terminated and the federal court alone had *exclusive* jurisdiction,"—and the plaintiff was enjoined from further prosecuting the case in the state court. To the same effect is *Sinclair v. Pierce*, 50 Fed. Rep. 851. "If the state court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if it is a case removable under the laws of the United States." *Stone v. South Carolina*, 117 U. S. 430.

It is conceded that these cases were removable to the federal court. As a logical consequence of these decisions of the federal courts, if this court should affirm the judgments in these cases, the supreme court of the United States, on appeal from this court, would reverse such judgments of affirmance, on the ground that the county court had lost jurisdiction to try them by their removal to the circuit court of the United States and that court taking jurisdiction thereof and proceeding therein.

It is with no pleasure, but with sincere regret, that we are compelled to hold that the long and expensive trial of these causes in the county court, involving such painful interest, and conducted with such signal ability to meritorious results, was without jurisdiction and *coram non judice*. We express no opinion on the question whether these causes were or were not lawfully removed, or upon the conse-

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quences of the mistake or the effect of its correction. This court has no jurisdiction to correct the errors of the circuit court of the United States, or to overrule its decisions in matters clearly within the jurisdiction of that court. It is sufficient and final that that court has decided these questions relating to its own jurisdiction of these cases. It is due, however, to the county court, that we should say that we believe it decided the question of its jurisdiction to try these cases honestly and impartially; and, to the learned counsel of the defendants in error, that they acted as they believed was their duty to their clients, and if they made a mistake it was an error of a usually sound judgment. The question was one on which the ablest lawyers might well disagree.

After the federal court had taken jurisdiction of the cases on removal from the county court, and granted leave to the defendant to answer, and after the county court had been notified thereof and moved to proceed no further in them, the plaintiffs moved for judgment by default on failure to answer; and thereupon the defendant asked leave to answer in said county court, which was granted on terms, and the defendant answered issuably and proceeded to defend the actions on the trial thereof. This was done, clearly, for the purpose of saving itself from a judgment by default, and from judgments in the actions after a trial thereof, and under *protest.* The learned counsel of the defendants in error contend that this was a waiver by the plaintiff in error of its right of removal of the cases to the federal court. This question has been decided by the federal courts, and it is held that on failure of a party to obtain an order of the state court to remove the case to a federal court, and he is forced to a trial in the state court, he does not lose his right to remove it. *Insurance Co. v. Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Railroad Co. v. Koontz*, 104 U. S. 5. "It has

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been repeatedly held by the supreme court that a party does not waive the right of removal by remaining in the state court and contesting the case on its merits, if the state court wrongly refused to order a removal." *Richards v. Rock Rapids*, 31 Fed. Rep. 506. This case is approved by this court in *Wadleigh v. Standard L. & A. Ins. Co.* 76 Wis. 442, and the same principle asserted. See, also, *Baltimore & O. R. Co. v. Ford*, 35 Fed. Rep. 170. This principle is not antagonized by *First Nat. Bank v. Conway*, 67 Wis. 210. In that case the party attempting a removal of the case to the United States court, after a denial of the application and before the record and papers had been transmitted to that court, had the case removed to another circuit on affidavit of the prejudice of the judge, and then made another application for its removal from the court to which the case had been sent to the federal court. It was held that he had waived thereby the right to the removal of the case on the first application. The party by his own act made it impossible to remove the case on the first application. The change of venue to another circuit and the removal to the federal court were utterly inconsistent.

No other way appears open to us than to *reverse* the judgments in these cases.

By the Court.— The judgments of the county court are reversed, and the causes remanded for the parties to take such action, or no action whatever, as they may be advised, except for a new trial, as no new trial can be had therein.

Upon a motion for a rehearing counsel for the defendants in error contended that this court had erred in not reviewing the legality of the order made by the county court refusing the application for removal; also that this court had proceeded upon the wrong theory that *questions of fact* were raised upon the allegations of the petition,

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which would be for the federal court to determine. No such questions were raised, however, as the only questions raised in the county court were the questions whether or not the petition and bond filed (in the circuit court) within the twenty days from date of service of summons and complaint showed upon the face thereof that as a matter of law the railroad company was entitled to a removal of these causes. These questions the county court had the right to determine, and having determined them against the company the only way they can be effectually reviewed is, first, by appeal to this court, and, second, by writ of error to the supreme court of the United States. *Mead v. Walker*, 15 Wis. 499; *Ackerly v. Vilas*, 24 id. 165, 2 Biss. 110; *Whiton v. C. & N. W. R. Co.* 25 Wis. 424; *Railroad Co. v. Whitton*, 13 Wall. 270; *Goodman v. Oshkosh*, 45 Wis. 355; *Eldred v. Becker*, 60 id. 48; *Jones v. Foster*, 61 id. 25; *First Nat. Bank v. Conway*, 67 id. 210; *Beyer v. Soper L. Co.* 76 id. 145; *Wadleigh v. Standard L. & A. Ins. Co.* id. 439; *Mahone v. M. & L. R. Corp.* 111 Mass. 72; *Bryant v. Rich*, 106 id. 180–191; *Du Vivier v. Hopkins*, 116 id. 125; *Weed S. M. Co. v. Smith*, 71 Ill. 204; *U. S. Sav. Inst. v. Brockschmidt*, 72 id. 370; *Cleveland, C., C. & St. L. R. Co. v. Monoghan*, 140 id. 474; *Mc Whinney v. Brinker*, 64 Ind. 360; *Insurance Co. v. Pechner*, 95 U. S. 183; *Amory v. Amory*, id. 186; *Carswell v. Schley*, 59 Ga. 17; *Indianapolis, B. & W. R. Co. v. Resley*, 50 Ind. 60; *Baltimore, P. & C. R. Co. v. N. A. & S. R. Co.* 53 id. 597; *Delaware P. Const. Co. v. D. & St. P. R. Co.* 46 Iowa, 406; *Hadley v. Dunlap*, 10 Ohio St. 1; *Gordon v. Longest*, 16 Pet. 97; *Stone v. State*, 117 U. S. 432; *Crehore v. O. & M. R. Co.* 131 U. S, 433; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 id. 513.

The motion was denied December 29, 1893.

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MEEHAN, Appellant, vs. BLODGETT, imp., Respondent.

November 28 — December 29, 1893.

Foreclosure of mortgage: Sale: "One year from the date of judgment:" Inadequacy of consideration: Laches.

1. Under sec. 3162, R. S., providing that "no sale shall be made until the expiration of one year from the date of" a foreclosure judgment, if the judgment has been signed and filed with the clerk and the costs have been taxed and inserted therein it need not be recorded before the year will begin to run.
2. Mere inadequacy of consideration is not a sufficient ground for setting aside a foreclosure sale.
3. Where defendant, with full knowledge of all the facts, waited for more than two years and until the property had materially increased in value before moving to set aside a foreclosure sale, he was guilty of such laches as to deprive him of the right to make the motion on the ground of inadequacy of consideration.

APPEAL from the Circuit Court for *Portage* County.

Judgment of foreclosure and for a sale of the mortgaged premises in this action was rendered December 4, 1889. It was dated and signed by the judge of the court and filed with the clerk on that day; the costs having been previously taxed and inserted therein, but it was not recorded or extended upon the record until March 17, 1890. The premises, which consisted of forty acres of land, were advertised to be sold under the judgment, February 7, 1891, and on that day were sold to the plaintiff for the amount of the judgment, interest, costs of sale, etc., amounting to $785; and a sheriff's deed was executed to him and thereafter recorded, but the sale had not been confirmed.

The defendant *Blodgett*, the mortgagor, on the 4th of March, 1893, more than two years after the sale, moved to set it aside on the ground that the judgment had not been entered at least one year before the premises were advertised for sale. This motion was founded on the affidavits

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of the defendant *Blodgett* and Charles P. Mason and one Malick, the latter affidavit being to the effect only that he (Malick) was then ready and willing to pay the sum of $2,000 for the land, and to bid that sum for it in case of a resale; that he considered it worth more; and that its value was increasing. The affidavits upon which the defendant moved made no claim that the consideration for the sale was inadequate. The affidavits on behalf of the plaintiff were by himself, to the effect that in 1889 and 1890 the property was of the value of $650 and no more, but that its value had increased of late, owing to the building of a large paper mill in the neighborhood and the improvement of the water power on the Wisconsin river near which it is situated, and that the value of the land at the present time did not exceed $1,500; that he had offered it for sale in 1892 at that price, but could not obtain it. H. W. Lee deposed to the effect that on behalf of the plaintiff he obtained possession of the land soon after the sale and had had possession for him ever since, that the annual income did not exceed $75, and that the amount bid for the land was more than the land was worth at the time of the sale; and he also deposed to conversations with said Mason in respect to the entry of the judgment, and with the defendant *Blodgett* and his son Charles in relation to the judgment and sale; that the sale was made openly and without haste, and every opportunity given to persons to purchase. A. W. Sanborn deposed that the premises, at the time of the sale, were not worth more than $450, and Patrick Meehan that, during the years 1889 and 1890, said premises were of the value of $650 and no more, and their present value does not exceed $1,500.

After the case had been heard upon the records and files and the aforesaid affidavits, and taken under advisement, leave was given to counsel on behalf of the defendant *Blodgett* to file certain affidavits or affidavit in reply to some or all of the statements contained in the affidavit of H. W.

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Lee, read at the argument, and subsequently defendant's counsel filed with the court a somewhat lengthy affidavit of *E. L. Blodgett*, sworn to on the 25th of April, 1893, and one of Andrew Lutz, Jr., of the same date, and an affidavit of August Krohn on the next day, and also one of W. W. Mitchell. These affidavits were objected to. That of *Blodgett* was to the effect, among other things, that he had rented the land and house thereon, before the sale, for $150 a year; that he had no knowledge that the sale was to take place until on or about the day it was made, but he was informed and advised by different parties that the sale was prematurely made and was illegal and void; that the plaintiff, before then, had promised to give him an opportunity to redeem from the judgment; that he has an offer from one Nelson of $2,000 for the land, and also from one Lutz of the same sum, as soon as he can settle with the plaintiff and get a release of his claim; that a few days after the sale he, with Lutz, went to the plaintiff and offered him the amount due on the judgment, with interest and costs, and demanded a quitclaim deed, but the plaintiff refused to give it. Lutz deposed that he considered the land well worth $1,500 at the time of the sale, and was now worth $2,000, which he would be willing to pay for it; and he corroborated the statement of the defendant as to his offer to pay the plaintiff the amount of the judgment, interest, and costs. Krohn deposed that the lands were worth the sum of $150 per annum prior to the year 1891, and since then a greater sum, and that the value of the property was from $1,600 to $2,000. There was no claim in any of the affidavits that the plaintiff had done anything to deceive or mislead the defendant in respect to the sale, or to put him off his guard.

In respect to the affidavits filed after hearing, the circuit court, in deciding the motion, made the following remarks, which he ordered should be incorporated in a formal order, namely: "While I allow the affidavits executed on April

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25 and 26, 1893, as a whole, to go on the files, I want it understood that I did not consider or regard any portion of them, except such as may be said from the reading of them to relate to matters mentioned in Mr. Lee's affidavit. I want that fact specially mentioned in the order, and the reason for it, because the files of course show these affidavits in the whole; and I want the order to recite the facts substantially as I have stated them in explanation of that matter, so that in case the order here announced is to be reviewed the supreme court will know just what was before me, and what portions of the records were not considered, and the reason for it." The order contained substantially this statement, and was to the effect that said sale be set aside and canceled. Plaintiff appealed therefrom.

H. W. Lee, for the appellant, argued, among other things, that the time when the judgment is actually spread upon the judgment book is immaterial. When signed and filed, it is the judgment of the court of that time and of that term. Freeman, Judgm. secs. 37–40; Black, Judgm. secs. 106, 110; *Craig v. Alcorn*, 46 Iowa, 560; *Los Angeles Co. Bank v. Raynor*, 61 Cal. 145; *Witter v. Dudley*, 42 Ala. 616. Defendant was guilty of gross laches, and relief should be denied on this ground alone. *Babcock v. Perry*, 8 Wis. 277; *S. C.* 4 id. 31; *Foster v. Hall*, 44 id. 568; *Raymond v. Pauli*, 21 id. 531; *Kane v. Parker*, 4 id. 123; *Pier v. Storm*, 37 id. 247.

For the respondent there was a brief by *Raymond, Lamoreux & Park*, and oral argument by *J. O. Raymond*. To the point that the sale was prematurely made, they cited *Ottillie v. Waechter*, 33 Wis. 252; *Andrews v. Welch*, 47 id. 132, 135; *Milwaukee Co. v. Pabst*, 64 id. 244, 247; *Fehring v. Swineford*, 33 id. 550.

PINNEY, J. 1. The statute in relation to sales on judgments of foreclosure provides that "no sale shall be made

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until the expiration of one year *from the date* of such judgment or order of sale." [R. S. sec. 3162.] In this case the judgment had been drawn up and signed and the costs had been taxed and entered therein; and, although it was dated and filed December 4, 1889, the contention is that, as it had not then been actually copied or extended upon the record, it was not a completed judgment, and that the date of the entry of the judgment is the time when it is so recorded or extended on the record. The recording of the judgment after its rendition is the mere ministerial act of the clerk. All that involved the exercise of judicial power had taken place when the judgment had been signed by the judge and filed with the clerk. The costs having been taxed, the sum necessary to redeem the premises and prevent a sale had been finally adjusted and declared. The object of the statute was to secure to the party entitled to redeem an entire year to do so after the amount necessary to be paid for that purpose had been ascertained and definitely declared by the judgment of the court. We are clearly of the opinion that the date of this judgment was December 4, 1889, when it was signed and filed. Whether it should be operative and carried into effect was in no proper or legal sense dependent upon any subsequent act or omission of the clerk. His failure or refusal to record it could not prevent its operation.

An inadvertent and casual expression in the case of *Andrews v. Welch*, 47 Wis. 132, is relied on as sustaining the defendant's contention. This precise question was not involved in that case. In that case the costs had not been taxed and inserted in the judgment one year before the sale, and it was held that, "in view of the object of the statute, . . . the year does not commence to run against a party entitled to redeem the mortgaged premises until the judgment is perfected by the insertion therein of the amount of the costs of the plaintiff," for the reason

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that until then the party entitled to redeem has no means of knowing what amount he must pay to the plaintiff or clerk for that purpose; and it was said that "there is no hardship or inconvenience in requiring the plaintiff in a foreclosure action to perfect his judgment by the taxation and insertion of the costs in the judgment, in order to bar the mortgagor or his assigns from redeeming the same under sec. 3165, R. S." It is manifest, from a careful reading of the opinion of the court in that case, that, had the costs been taxed and inserted in the judgment, the order of the circuit court would not have been reversed.

It has never been held by this court that an appeal would not lie from a judgment signed and filed and in which the costs as taxed had been inserted. Cases in which it has been ruled that until the judgment is actually rendered and entered and the costs are taxed and inserted therein, an appeal therefrom cannot be taken, and that the time within which an appeal may be taken does not begin to run until then, have no bearing upon the question under consideration. When the costs have been taxed and inserted in the judgment, and it has been filed with the clerk, it is complete for all the purposes of this statute. It is a completed judgment, within the meaning of the law, although not recorded.

2. While we think that upon a fair construction of the record the sale was set aside solely upon the ground that the judgment was not complete until actually recorded, and that it took its date from that time, and not because of inadequacy of consideration, yet, as counsel maintain different positions in this respect, and the record is not entirely clear, we have thought it right to consider the question of adequacy of consideration, although it is evident that the motion was made upon the ground already considered, and that the question of adequacy of consideration was not distinctly presented in the motion papers. There is not the

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least evidence of fraud or any unfair practice on the part of the plaintiff or his attorney, or of the officer who conducted the sale, or that the defendant was in any way misled or surprised by anything that they or either of them said or did. It is the settled practice of courts of equity in this country to refuse a resale for mere inadequacy of price, and the court is not at liberty to depart from this rule where no other cause exists. *Strong v. Catton*, 1 Wis. 471, 496. No other ground, save mere inadequacy of consideration, is suggested. It is not denied that the defendant knew that the sale was about to take place, and the plaintiff deposes that he had often solicited the defendant to redeem. The evidence on the question of value took a wide range, and was very general, tending to show that the land may have had a speculative value in the estimation of some and not in the estimation of others. The defendant had full knowledge of the facts upon which he now claims the sale was premature and should have been set aside, for more than two years before he made his motion. He has slumbered on his rights for a longer period than the law allows for the taking of an appeal from a final judgment. The plaintiff has had possession of the premises in the mean time, and no excuse whatever is shown for the extraordinary delay in making this motion. It appears that the value of the property has recently materially increased by reason of important improvements near it, and it is not unlikely that after the sale was made the defendant was quite willing to shape his action by the course of future events in that respect. We think that he was guilty of such laches as to deprive him of the right to make this motion on the ground of inadequacy of consideration.

No sufficient ground was shown for setting aside the sale, and the order appealed from must therefore be reversed, and the cause remanded for further proceedings according to law.

By the Court.— It is ordered accordingly.

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HALL, Respondent, vs. THE AMERICAN MASONIC ACCIDENT ASSOCIATION, Appellant.

November 28 — December 29, 1893.

Accident insurance: Sole cause of death: Special verdict: "Grocer delivering goods by occupation:" Evidence: Res gestæ: *Immaterial error.*

1. In an action upon an accident insurance policy, although the medical testimony (somewhat stated in the opinion) was conflicting as to the cause of the death of the assured, a finding by the jury that an injury resulting from a fall was the sole cause of death is *held* to be supported by the evidence.
2. An affirmative answer to the question, "Was such injury the sole cause of death?" is *held* to be a finding that the injury was the sole and proximate cause of the apoplexy which, it was conceded, was the immediate cause of death; there having been no objection by defendant to the questions submitted, and no request for a specific question as to whether the injury was the cause of the apoplexy.
3. The jury were instructed that "a grocer delivering goods by occupation," within the meaning of the classification of risks in the policy, is one who habitually delivers, in person, goods sold to his customers, and that an occasional delivery by himself — the rule being that delivery is made by others — would not make him a grocer delivering goods. There was no exception to this instruction. *Held*, that the finding that the assured was not "a grocer delivering goods by occupation" was supported by testimony that, while he occasionally delivered goods, his son delivered the principal part of them.
4. A statement made by the assured as he lay upon the ground after he fell, or when he was getting up, that "It was a hard one," or "that he got a bad one," was admissible in evidence as of the *res gestæ.*
5. A statement by the assured, a few hours after his fall, that he was feeling badly, was admissible.
6. An error in admitting evidence of a statement by the assured, made some time after the accident, that he was badly hurt, was not material, that fact being conclusively proved by other evidence. WINSLOW, J., dissents, being of the opinion that the fact that the injury was serious was not conclusively proven.

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APPEAL from the Circuit Court for *Waupaca* County.

The action is upon an accident and life insurance policy, issued August 16, 1890, by the defendant, the *American Masonic Accident Association*, to Orin Hall, in which his wife, the plaintiff herein, is named as the beneficiary, to recover a death indemnity of $5,000. The risks taken by the company are classified with reference to employment and perhaps other conditions. Class E embraces a "grocer, proprietor or clerk, delivering goods," and the death indemnity therein is limited to $2,000. The maximum death indemnity in class A is $5,000, but not to exceed $2 for each member of the association in good standing at the time of the accident. In his application for the insurance, Orin Hall made the following statements and warranties: "Kind of business: General merchandise. Occupation: Merchant. Duties required fully described: Proprietor." It is conceded that if plaintiff is entitled to recover the insurance it is in class E or class A, and if it is not proved that Orin Hall was a "grocer delivering goods" the insurance is in class A.

The contract of insurance is that the plaintiff is entitled to recover the death indemnity only in case the death of her husband resulted from an injury effected through external, violent, and accidental means, which, independently of all other causes, produced his death; and, further, if the injury was received in any occupation or exposure classed by the association as more hazardous than he thus represented his occupation to be, the association is only liable for the sum it pays for such increased hazards.

Orin Hall was a resident of Waupaca, and had been such for several years before the policy in suit was issued, and until after April 29, 1892. He was proprietor of a store mostly for the sale of groceries. A witness thus testified concerning it: "There was a kind of miscellaneous lot of goods kept there for sale, mostly groceries, and a stock of

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jewelry and fancy notions; a miscellaneous stock of crockery — that is, there was not much of that either, but a few tumblers, and such things as that — and plated ware." During the afternoon of April 29, 1892, when Mr. Hall was at the railway depot at Waupaca receiving freight into his wagon, and while standing in the hind end of his wagon, he accidentally fell to the ground between the wagon and the depot, and was injured. While still lying on the ground, or when just arising therefrom, he complained that he was badly hurt, or, as he expressed it, he "got a bad one." He got upon his wagon and drove to his store; went from there to his residence; returned to his store in the evening; then went again to his residence, and never left it thereafter alive. He suffered great pain, grew constantly worse, and died May 19th, three weeks after he was hurt.

No question arises on the pleadings. There was a special verdict, which indicates the defenses urged by the association. It is as follows: "(1) Did deceased receive an injury through external, violent, and accidental means? *Answer.* Yes. (2) If you answer the first question 'Yes,' was such injury the sole cause of death? *A.* Yes. (3) Did the accident occur, directly or indirectly, in consequence of chronic degeneration of the brain? *A.* No. (4) Was deceased a grocer delivering goods, by occupation, at the time. *A.* No. (5) Do you find generally in favor of the plaintiff or for the defendant,— which? *A.* Plaintiff."

At the time Mr. Hall was injured the association numbered 2,180 members in good standing. The court denied a motion on behalf of the association for a new trial, and gave judgment for plaintiff for $4,360, besides interest and costs. The case is further stated in the opinion. The association appeals from the judgment.

M. C. Phillips, for the appellant, to the point that by the "sole cause of death" is meant the proximate, i. e. that

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cause which directly precedes and produces the effect, as distinguished from remote cause, cited *Lawrence v. Accidental Ins. Co.* in Richards, Ins. 522; *McCarthey v. Travelers' Ins. Co.* 8 Biss. 362; Cook, L. & A. Ins. sec. 49; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52; *Martin v. Equitable Acc. Asso.* 61 Hun, 467.

For the respondent there was a brief by *Bump & Kreutzer*, and oral argument by *E. L. Bump*. Upon the question of the liability of the company in cases where the defense is interposed that death was caused by disease and that the injury was not the sole or proximate cause of death for that reason, they cited *Nat. Ben. Asso. v. Grauman*, 107 Ind. 288; *Barry v. U. S. Mut. Acc. Asso.* 23 Fed. Rep. 712; *Freeman v. Mercantile Mut. Acc. Asso.* 156 Mass. 351; *Standard L. & A. Ins. Co. v. Thomas*, 17 S. W. Rep. (Ky.), 275; *Martin v. Equitable Acc. Asso.* 61 Hun, 467; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296; *Peck v. Equitable Acc. Asso.* 52 Hun, 255; 22 Cent. Law J. 413, 436; 27 id. 158, 284; *Accident Ins. Co. v. Crandal*, 120 U. S. 527.

LYON, C. J. No exception was taken to the charge given by the court to the jury, nor to the refusal of the court to give certain instructions proposed on behalf of the defendant association. Hence, for the purposes of the case, it must be assumed that the court stated the law correctly to the jury. The grounds alleged for a reversal of the judgment will be stated and disposed of in their order.

1. It is maintained that there is no sufficient evidence to support the finding that the injuries received by Orin Hall on April 29, 1892, were the sole cause of his death, but that on the contrary the proof is conclusive that the primary cause of his death was long-standing disease and degeneracy of the brain, producing apoplexy, which it is conceded was the immediate cause of death.

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Two physicians and surgeons were called as witnesses by each party, and gave testimony as experts. Those called by the plaintiff were Dr. Pelton (who attended Mr. Hall as his physician from the time he was injured until his death) and Dr. Russell. Those called for the defendant were Dr. Hendricks, professor of anatomy in the University of Minnesota, and Dr. Oviatt. A post-mortem examination of Mr. Hall's brain was made by Drs. Hendricks and Pelton in the presence of Dr. Russell. We shall not attempt to state much of their testimony or to discuss it at any considerable length.

The medical witnesses appeared to be gentlemen of culture and professional ability, and to have testified honestly; yet they differ radically in their statements of facts concerning the condition of the brain of Mr. Hall, and in their opinions as to the causes and effects of those conditions. Thus, the testimony of Drs. Pelton and Russell is to the effect that Mr. Hall's fall from the wagon might have caused, and probably did cause, concussion and contusion of the brain, which finally resulted in apoplexy and death. They both testify that in their opinion the injury was the proximate cause thereof. Their opinions are strengthened by the fact that there is sufficient testimony (although controverted) to support a finding that Mr. Hall enjoyed his usual good health up to the time he was injured, and showed none of the indications of degeneration of the brain which all the physicians agree attend that disease. Besides, Dr. Pelton saw Mr. Hall daily, frequently several times the same day, from the time he was injured until he died, and thus had the best possible opportunity to watch his symptoms and to form a correct judgment of the real cause of his death.

On the other hand, Dr. Hendricks testified to the existence of degeneracy of the brain and a diseased condition of certain arteries, which in his opinion were of long standing,

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and caused the death of Mr. Hall, independently of the injury. On the hypothesis that Dr. Hendricks diagnosed the case correctly, Dr. Oviatt agreed with him as to the cause of death.

The medical witnesses differ as to whether the seat of the apoplexy was in the cerebrum or cerebellum; also, as to the extent and chronic character of the alleged degeneracy of the brain, and the existence of diseased arteries. Some degeneracy of the cerebrum, or large brain, was proved, but if the effusion of blood which caused the apoplexy and death was in the small brain, or cerebellum, it is quite obvious that such disease of the large brain was not the cause of death. It is not claimed that there was any chronic disease of the small brain. We think the testimony is sufficient to support findings that, when Mr. Hall was injured, the cerebellum, or small brain, was in a healthy condition, and that his fall produced such concussion or contusion thereof that the injury culminated in an effusion of blood thereon, which produced apoplexy and death, without the intervention of any other independent or proximate cause. Hence, the finding that the injury was the sole cause of the death of Mr. Hall is supported by the evidence.

2. Another error assigned is that the special verdict does not determine all the material litigated issues of fact. If we understand the argument correctly, it is that, inasmuch as it is conceded that apoplexy was the immediate cause of death, a further question should have been submitted to the jury as to whether the injury was the proximate and sole cause of the apoplexy. In the absence of any request on behalf of the association to have such question submitted, and of any objection or exception to the questions which were submitted to the jury, we think it should be held that the question above suggested is included in the second question, "Was such injury the sole cause of death?" and the affirmative answer to that question is a finding that the

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injury was the proximate and sole cause of the apoplexy. We conclude that the special verdict includes all controverted material issues of fact in the case, and supports the judgment for plaintiff.

3. It is sufficient to say of the third finding, which is that the injury was not caused, directly or indirectly, by any chronic degeneration of the brain, that such finding is abundantly supported by the evidence.

4. The fourth finding is that, when injured, Mr. Hall was not "a grocer delivering goods by occupation." The effect of the finding is that his occupation did not place the insurance in class E, in which the death indemnity is limited to $2,000, but left it in class A, in which the maximum death indemnity is $5,000. This finding is attacked on the ground that the evidence does not support it, but proves conclusively that, when injured, Mr. Hall was by occupation "a grocer delivering goods."

The court instructed the jury that "a 'grocer delivering goods,' as expressed in the contract in suit, is one who is engaged as a dealer in groceries, and habitually delivers, in person, goods sold to his customers. An occasional delivery by himself — the rule being that delivery is made by others — would not make him a grocer delivering goods." In the absence of exception to the instruction, such is the law of this case, and is probably good law in any case. The testimony on the subject is somewhat conflicting, but one witness, who was entirely familiar with Mr. Hall's business methods, testified that he occasionally delivered goods, but that his son Charles, he thought, delivered the principal part of them. It appeared that Mr. Hall himself usually received goods at the depot which were consigned to him, and hauled them to his store, but it is not claimed that this was delivering goods within the meaning of the policy. It was competent for the jury to believe the above testimony, and it supports the fourth finding. It requires no argu-

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ment to show that the judgment is in strict accordance with the special verdict.

5. It is claimed that the court admitted testimony on behalf of plaintiff of Mr. Hall's statements of the circumstances of the injury he received, made a considerable time after he was injured, and when such statements were no part of the *res gestæ*. This court has uniformly held testimony of that character inadmissible. It is needless to cite the cases affirming that rule. An examination of the testimony which it is claimed violates such rule is necessary.

Mr. Bea was present when Mr. Hall was hurt, and testified that as the latter lay upon the ground after he fell, or when he was getting up, he said, "It was a hard one," or "that he got a bad one,"—meaning, of course, that he was badly hurt. Such statement, thus made, was of the *res gestæ*, and admissible in evidence under all the authorities.

Mr. Kingsbury, who was Mr. Hall's clerk, was permitted to testify, under objection, that, when Mr. Hall returned to his store after he was hurt, witness asked him, "What is the matter?" and he replied, "I am hurt awful bad." This was inadmissible, for such statement was not of the *res gestæ*. But its admission could not possibly have injured the defendant, because the proof is entirely conclusive that Mr. Hall was badly hurt. Hence, the error in admitting such statement is not sufficient ground for reversing the judgment, for it tended to prove nothing that is not conclusively proved without proof of such statement, and hence could not have affected the verdict.

The same remarks are applicable to the testimony of Mr. James to a conversation with Mr. Hall at his store on the evening after he was injured. The witness testified that Mr. Hall said: "'I am feeling badly; I met with an accident.' I says, 'What is it?' He said, 'I fell at the depot.'" It is conclusively proved that Mr. Hall met with an accident, and that he fell at the depot. Proof of his statement

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that he was feeling badly was competent. *McKeigue v. Janesville*, 68 Wis. 50, and cases cited in the opinion. Plaintiff was allowed to testify, not, as stated by counsel, that her husband said, after he reached home, his *hurt* was terrible, but that his *head* was terrible. This was admissible under the rule just stated.

It is believed that the foregoing observations dispose of all the material errors alleged as grounds for reversal. We fail to find that any of the alleged errors are well assigned. The judgment of the circuit court must be affirmed.

WINSLOW, J. I think this judgment should be reversed because of the erroneous admission in evidence of statements made by the deceased as to the extent of his injury, made a considerable time afterwards, and which were not a part of the *res gestæ*. The question as to whether the injury was serious or not was a very important one in the case, and seemed to me by no means conclusively proven.

By the Court.— Judgment affirmed.

TOPPING, Administrator, Appellant, vs. THE TOWN OF ST. LAWRENCE, Respondent.

November 28 — December 29, 1893.

Death by wrongful act: Pleading: Pecuniary injury: Survival of action.

1. In an action under secs. 4255, 4256, R. S., to recover damages for the death of plaintiff's intestate, who left no widow and whose children are none of them alleged to be infants, the complaint is *held* defective in not showing that there were any persons to whom pecuniary injury resulted from such death.
2. An action to recover the amount of expenses incurred in consequence of a personal injury which was caused by defects in a highway and resulted in death, cannot be maintained by the personal representative of the deceased.

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APPEAL from the Circuit Court for *Waupaca* County.

The facts are stated in the opinion.

For the appellant there was a brief by *E. L. & E. E. Browne*, and oral argument by *E. E. Browne.*

For the respondent the cause was submitted on the brief of *Cate, Jones & Sanborn.*

ORTON, J. The circuit court sustained the objection of the defendant to any testimony being taken on the ground that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff not offering to amend the complaint, the action was dismissed and judgment rendered against the plaintiff for costs. The plaintiff has appealed from the judgment.

The only question, therefore, is as to the sufficiency of the complaint. The complaint, in substance, is that William Topping, deceased, on the 1st day of July, 1891, was very severely injured by reason of the insufficiency and want of repair of a certain highway of said town, which consisted of holes in a certain bridge or culvert and large stones near by in said highway. On the 22d day of November, 1891, the said William Topping died of the injuries so received. In the intervening time between said injury and his death the said William Topping, on the 16th day of September, 1891, caused a notice to be served on one of the supervisors of said town, stating the place where said injury occurred, and describing the insufficiency and want of repair which caused the injury; and on the same day caused to be filed with the clerk of said town a written statement of his claim, to be laid before the board of audit; and said board met, considered, and rejected said claim, but not until the 5th day of April, 1892,—after his death. These steps were taken preparatory to commencing suit against said town for said injury. During the last sickness of the said William Topping, physicians, nurses, and medi-

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cines were necessarily employed, at an expense of $700, and after his death his funeral expenses were $75, and the wagon and harness injured in said accident were repaired at an expense of $25. These expenses were paid by *Warren C. Topping*, Gilbert W. Topping, Myron M. Topping, Frank H. Topping, Ellen Vaughn, and Evelyn E. Watts, the children and heirs at law of William Topping (deceased); and the said *Warren C. Topping* was duly appointed administrator of his estate. The said children procured the said medicines and medical attendance at the request of their father, the said William Topping. The said William Topping had no wife at the time of said injury, and left no widow, as a matter of course, at his death. It was said on the argument that the said William Topping was over eighty years of age when injured. The said children are none of them alleged to be under twenty-one years of age, and they were all probably beyond that age, judging from their father's age. The plaintiff demands judgment for $5,000, interest, and costs.

It will be observed that all the expenses, etc., which were paid by the children for their father and for his estate were incurred in consequence of the injury caused by the negligence of the town in not repairing said highway. William Topping was about ready to commence suit against the town for his damages, when death arrested his purpose. There is nothing more certain than that such an action abated at the death of William Topping. Such an action of tort may not be waived for an action on contract, and that is the only exception as to torts.

An action in consequence of the injury survives only by reason of the death of the injured person, caused by it. It is strictly not proper to say that such an action survives. It is rather a new action given by statute (secs. 4255, 4256, R. S.), and which may be brought for the benefit, not of his estate, but of his children, if any, who have sustained

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some pecuniary loss or damage by his death. The damages which can be recovered are limited to a mere indemnity. The children must have some pecuniary interest in his life, which they have lost by his death. In other words, the continuance of his life must have been of some pecuniary advantage to the beneficiary, which has been terminated by his death. Hence the widow, if living, and if not, then the infant children, are the proper beneficiaries in this case, if there were any such.

The complaint must show that there are such beneficiaries, to entitle the administrator to bring the suit for their benefit. The value of the life of the deceased to any one is in issue in such a case, and his ability to contribute for the support of his family. Therefore those only are the beneficiaries who are entitled to such support. The statute (sec. 4256, R. S.) sufficiently defines this purpose: "And in every such action, the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the *pecuniary injury* resulting from such death, *to the relatives* of the deceased specified in this section." In *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599, Chief Justice COLE has explained, in his able and elaborate opinion, the true scope and limitations of this remedy given by the statute, in the light of former cases in this court and of the decisions of the courts of New York, in very clear and explicit language; and any further discussion of the question is unnecessary. The complaint is materially defective in not showing that there are any persons who have sustained any pecuniary loss or damage by the death of William Topping, or to whom his life would have been of any pecuniary benefit or advantage, or to whose pecuniary support his life would have contributed. The ruling of the circuit court was correct.

By the Court.— The judgment of the circuit court is affirmed.

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MAHER, Respondent, vs. THE DAVIS & STARR LUMBER COMPANY, Appellant.

November 29 — December 29, 1893.

(1) *Change of venue: Convenience of witnesses: Waiver.* (2) *Contracts: Performance in specified time: Delay caused by other party.*

1. Where a defendant corporation had the absolute right to have the place of trial changed to the county in which said corporation was located, plaintiff's opposition to such change on the ground that the convenience of witnesses and the ends of justice would be promoted by retaining the cause in the county in which it was brought, and his final consent to the change, did not constitute a waiver of his right to have the venue changed back to the original county on said ground, if the court of the county to which the first change was made should in its discretion so order.
2. Defendant having agreed in writing to pay plaintiff a certain amount for drawing lumber to defendant's yard, to furnish a wagon for such purpose, and to pay twenty-five cents additional for each 1,000 feet if the whole quantity should be delivered in a specified time, plaintiff was entitled to recover the additional pay, although he did not complete the delivery in the specified time, if the delay was caused by defendant's refusal to furnish the wagon or failure to furnish the requisite facilities for unloading the lumber in the yard.

APPEAL from the Circuit Court for *Pepin* County.

The defendant corporation was located at Eau Claire, and had a mill at Durand in Pepin county, where the plaintiff resided. On September 5, 1890, the plaintiff made a proposition to the defendant in writing, to the effect that he would begin immediately to haul and deliver to the defendant, in its said mill yard, about 60,000 feet of lumber therein described, at the prices therein named, and complete such delivery on or before November 1, 1890; that the plaintiff should receive his pay for the amount hauled at the end of each week; that, if the whole amount should be delivered as agreed, then the defendant should pay the plaintiff twenty-five cents for each 1,000 feet so delivered, in addition to

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the price named therein; that the defendant should furnish to the plaintiff free of charge, if he desired, one of its large wagons on which to haul said lumber; that the plaintiff should pay for all breakage or damage to said wagon while in his possession, and return it to said yard upon the completion of the job; that, should the amount exceed 60,000 feet, then the plaintiff should have ten days' additional time to complete the job. On the same day the defendant accepted said proposition in writing, and, in consideration of the performance of all the conditions therein, agreed to make the payments therein stated and in the manner set forth in said proposition.

The plaintiff delivered the lumber mentioned, but not within the time called for by the contract, and the defendant paid for hauling all of such lumber according to the prices named in said proposition, except the twenty-five cents additional, which it refused to pay. Thereupon, and on January 19, 1891, the plaintiff commenced this action by attachment in a justice's court in Pepin county. Issue was joined therein before said justice. On March 2, 1891, the plaintiff recovered judgment, and the defendant thereupon appealed from said judgment to the circuit court for Pepin county. Upon application of the defendant, the court, June 20, 1891, changed the venue to Eau Claire county, where the defendant resided. Upon the application of the plaintiff, the court, September 28, 1891, ordered the venue changed back to Pepin county, for the convenience of witnesses.

At the close of the trial of said action the jury returned a verdict in favor of the plaintiff and against the defendant for $16.97. From the judgment entered on said verdict, with costs, the defendant appeals.

For the appellant the cause was submitted on a brief signed by *Doolittle & Shoemaker.*

C. M. Hilliard, for the respondent.

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CASSODAY, J. The defendant took the requisite steps to secure the change of the place of trial from the county of Pepin to the county of Eau Claire, where the defendant was located. The cause having been commenced in the wrong county, the defendant, under the statutes, had the absolute right to the change; and hence the court would have had no right to retain the cause on the ground that the convenience of witnesses and the ends of justice would be thereby promoted. R. S. secs. 2621, 2624; *Van Kleck v. Hanchett*, 51 Wis. 398; *Meiners v. Loeb*, 64 Wis. 343. It follows that such change was properly made by the circuit court for Pepin county. In fact it was finally made, as recited in the order, by the *consent* of the plaintiff's attorney, although he had at first opposed the application on the ground that the convenience of witnesses and the ends of justice would be promoted by retaining the cause. Subsequently the plaintiff, upon proper showing, moved the circuit court for Eau Claire county to change the venue back to Pepin county, on the ground that "the convenience of witnesses and the ends of justice would be promoted by the change;" and the same was changed accordingly. Such change rested in the sound discretion of that court. R. S. sec. 2622, subd. 3; *Postel v. Weinhagen*, *ante*, p. 302; *Challoner v. Boyington*, *ante*, p. 217; *Cartright v. Belmont*, 58 Wis. 370. Being discretionary, and it not appearing that there was any abuse of such discretion, we must hold that such change was properly made. The contention is that the plaintiff, by his opposition to the first change and then finally giving his assent thereto, had waived his right to have the venue changed back to Pepin county on the ground mentioned; but, under the statutes and the cases cited, the court was precluded on the first motion from considering the question of the convenience of witnesses and the ends of justice, and hence that question was not involved in the first order.

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We find no reversible error in the admission of evidence as to the prices to be paid for the hauling. There was no dispute or controversy as to such prices. The defendant paid all it had agreed to pay under the contract, except the twenty-five cents additional for every 1,000 feet mentioned therein. No judgment is to be reversed or affected by reason of errors which do not affect the substantial rights of the adverse party. R. S. sec. 2829.

The evidence appears to be sufficient to sustain the verdict. The case was submitted to the jury on the theory that the plaintiff could not recover the twenty-five cents additional for each 1,000 feet, unless the delay in completing the job was in consequence of the defendant's refusal to furnish the wagon, or its failure to furnish the requisite facilities for unloading the lumber in the yard. The testimony on the part of the plaintiff tended to prove that he at first procured the wagon from the defendant, and that the defendant thereafter caused the same to be taken away against his protest, but subsequently promised, from time to time, to send the wagon back, but failed to do so; that the defendant had insufficient help in the yard, and consequently the plaintiff was at times delayed several hours in unloading. The contract expressly provided that the lumber should be graded and scaled by the defendant's authorized representative at the yard. The charge of the court appears to have fully and fairly presented the case on both sides. The mere fact that it stated the claims of the respective parties is no ground for exception. The trial judge said: "The contract provides that it be unloaded in the yard, on piles to be designated by the defendant. The custom of the yard, it seems, was to have this lumber scaled as unloaded and piled, so they might know how much each man hauled, and to regulate his pay accordingly. Of course, more or less delay would result

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necessarily, probably, in transacting the business, but the plaintiff claims this delay was unnecessary and unreasonable;" and so he left it to the jury to determine whether the delay, if any, was or was not unnecessary and unreasonable.

In regard to the plaintiff's claim that, after the making of the contract, he procured the wagon, and that the defendant took it away and agreed to return it to his place, the judge charged the jury, among other things, that: "Now, if you find as a fact that the defendant, by Mr. Nelson, as the agent, did agree to deliver a wagon,— not agreed to deliver it here at the yard, but agreed to take it up to the home of the plaintiff,— and the plaintiff relied upon such promise, and expected that wagon to be so delivered, and their failure to deliver that wagon was the reason why he could not deliver this lumber within the time (November 1st), with no fault on the part of this plaintiff, that would probably be sufficient excuse for not delivering the lumber by November 1st, and entitle plaintiff to the twenty-five cents extra. But, if there was no agreement to deliver the wagon at the plaintiff's home, but he was told and given to understand he could have one there by hauling it home, then I charge you, as a matter of law, it was his duty to accept a wagon there and haul it home. He should have taken it at the yard unless there was an express agreement to the contrary that it should be hauled to his house." We perceive no error in such portions of the charge. It was certainly competent to thus modify the written agreement by parol. The court then charged the jury, in effect, that the plaintiff could recover nothing for the use of the wagon; and then said: "I cannot allow any recovery here, except the twenty-five cents per M. extra; and, of course, whether you will allow that or not will depend upon whether the plaintiff was prevented from filling his contract by the

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wrongful acts of the defendant,— that is, by the failure of the defendant to do its duty under the contract."

We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

WILBER, Respondent, vs. THE WISCONSIN CENTRAL COMPANY, Appellant.

November 29 — December 29, 1893.

Railroads: Injury to employee: Contributory negligence.

While plaintiff, a fireman, was walking through defendant's switch yard to the roundhouse to take out his engine, he was struck and injured by cars which had been "kicked" by a switch engine upon the track on which he was walking. He was familiar with the yard, and knew that switching was actively in progress on the tracks behind him, but although there were spaces between the tracks where he could have walked with safety, and although his ears were covered by his cap, he had walked on or immediately beside the main track for about 180 feet without looking around. *Held*, that he was guilty of contributory negligence.

APPEAL from the Circuit Court for *Dunn* County.

Action to recover for personal injuries. The following facts appear, principally from the plaintiff's own testimony: Plaintiff was a fireman upon defendant's freight engine running from Chippewa Falls to St. Paul. He lived at Chippewa Falls, and his engine was kept at the roundhouse at Irvine, a small village a mile and a half westerly from Chippewa Falls. On the morning of March 8, 1890, between the hours of 5 and 6 o'clock, the plaintiff was going from his home in Chippewa Falls to the roundhouse at Irvine, to take his engine preparatory to a trip. It was very cold,— probably thirteen degrees below zero,— and his

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ears were covered by his cap, and his overcoat was turned up around his neck. When approaching Irvine he walked along the main track of the railroad until he reached the switch yard of the defendant, which extended east and west for a considerable distance and contained three sidings upon the north side of the main track at the point where plaintiff was injured. This yard was frequently used by employees passing from Irvine to Chippewa Falls. Plaintiff entered the yard at the east end, and was proceeding westerly to the roundhouse at the other end of the yard. As he came to the first or main switch at the east end of the yard, he met the yard switch engine with its crew, which was just pulling seven freight cars from the main switch track out upon the main track. He exchanged some words with the yard master and switchman at this main switch, and then walked on westerly about 200 feet on the ground south of the main track. He then looked back, and, as he testifies, saw the yard employees and a car down by the switch, but thought the car was not on the main track. He then approached the main track because, as he claims, the ground was rough, and walked, by his own admission, 178½ feet on the ends of the ties on the south side of the main track without looking back, when he was struck by three or four cars which had been "kicked" westward on the main track by the switch engine. He was knocked down, and his arm was cut off. No person was on the detached cars to warn him of their approach. There were vacant spaces north of and between the main track and the switch tracks, thirteen feet in width, where the plaintiff could have walked in safety. He knew the yard well, having worked as helper in the railroad blacksmith shop near by, and also having fired for a number of nights on this very switch engine.

There was other testimony, but it is not deemed necessary to state it. It was claimed that the yard master was

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negligent in not having a man upon the cars which ran over the plaintiff, to warn him of their approach. A motion to direct a verdict for defendant was overruled. The jury found, in reply to special questions, (1) that the yard master was negligent in causing the cars which struck plaintiff to be kicked down the main track without a man on them; (2) that plaintiff was not guilty of contributory negligence: and (3) that plaintiff's damages were $6,970. From judgment for the plaintiff on the verdict, defendant appealed.

For the appellant there was a brief by *D. S. Wegg* and *T. H. Gill*, and oral argument by *Mr. Gill*. To the point that plaintiff's own testimony shows he was guilty of contributory negligence, they cited *Delaney v. M. & St. P. R. Co.* 33 Wis. 67; *Schilling v. C., M. & St. P. R. Co.* 71 id. 255; *Williams v. C., M. & St. P. R. Co.* 64 id. 1; *Schmolze v. C., M. & St. P. R. Co.* 83 id. 659; *Schoenfeld v. M. C. R. Co.* 74 id. 433; *Penn. R. Co. v. O'Shaughnessy*, 122 Ind. 588; *Ellis v. Houston*, 4 N. Y. Supp. 732, 22 N. E. Rep. 1131; *Elliot v. C., M. & St. P. R. Co.* 5 Dak. 523; *Holland v. C., M. & St. P. R. Co.* 18 Fed. Rep. 243; *Ryall v. C. P. R. Co.* 76 Cal. 474; *Redmond v. R., W. & O. R. Co.* 10 N. Y. Supp. 330; *Ill. Cent. R. Co. v. Dick*, 15 S. W. Rep. (Ky.), 665; *McAdoo v. R. & D. R. Co.* 105 N. C. 140; *Richards v. C., St. P. & K. C. R. Co.* 81 Iowa, 426; *Smith v. N. Y. C. & H. R. R. Co.* 17 N. Y. Supp. 400; *Jolly v. D., L. & N. R. Co.* 93 Mich. 370; *Candelaria v. A., T. & S. F. R. Co.* 27 Pac. Rep. (N. Mex.), 497; *Haden v. S. C. & P. R. Co.* 48 N. W. Rep. (Iowa), 733; *Craig v. Mt. Carbon Co.* 45 Fed. Rep. 448; *Aerkfetz v. Humphries*, 145 U. S. 418; *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 325; *Chicago & N. W. R. Co. v. Donahue*, 75 id. 106; *Collins v. B., C. R. & N. R. Co.* 83 Iowa, 346.

For the respondent there was a brief by *E. C. Higbee*, attorney, and *Losey & Woodward*, of counsel, and oral argument by *E. C. Higbee* and *G. M. Woodward*.

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WINSLOW, J. There is practically no dispute as to the facts in this case. The plaintiff was an employee of the defendant, fully acquainted with the switching yard through which he was walking, and knew that switching was actively in progress on the tracks behind him at the very time he was walking on the main track. His hearing was either wholly or partially cut off by the fact of his cap being pulled down over his ears. There were spaces between the tracks where he could have walked with safety; but, knowing all these facts, he chose to walk on, or immediately at the side of, the main track, where a passing car would strike him, for a distance of at least 178½ feet, without looking around. If this was not careless — even reckless — conduct, we should not know where to find it. Within the rules laid down in the cases of *Delaney v. M. & St. P. R. Co.* 33 Wis. 67, and *Schilling v. C., M. & St. P. R. Co.* 71 Wis. 255, we must hold, under this testimony, that the plaintiff was, as matter of law, guilty of contributory negligence.

By the Court.— Judgment reversed, and action remanded for a new trial.

PERKINS, Respondent, vs. WILKINSON, imp., Appellant.

November 29 — December 29, 1893.

Tax titles: Person bound to pay taxes cannot acquire: Vendor and purchaser of land: Mortgages: Fraud: Bona fide *purchaser.*

1. One with whose means land was purchased, and who agreed, as part of the consideration, to pay existing mortgages thereon, and who continued to be the real owner and, through tenants, to be in possession of the land, although for purposes of his own the apparent legal title was at times in different other persons, was, as between himself and the grantor, who besides holding a mortgage for a part

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of the purchase price had become the owner of the prior mortgages mentioned, bound to pay the taxes on the land and could not, as against said mortgages, acquire a valid tax title founded on a sale for such taxes.

2. A tax deed so obtained by such real owner for the purpose of cutting off said mortgages is *held* in this case to have been the result of a deliberate fraud; and one to whom he conveyed the land, and who had knowledge of the mortgages and of the relations of his grantor to the premises, and who gave nothing for such conveyance except a release of stale claims against his grantor and his son-in-law (his grantor's son), is *held* not to have been a *bona fide* purchaser.

APPEAL from the Circuit Court for *Pierce* County.

This action was brought by the plaintiff as the owner of three mortgages on the premises described in the complaint, being a farm in Pierce county known as the "Dexter Owen Farm," and upon which mortgages there was due about $5,700, to set aside, as fraudulent and void, a certain tax deed thereof to the defendant Webster, dated August 26, 1890, and a conveyance by him to the defendant *Wilkinson* September 12, 1890; and it was charged that the defendant *Wilkinson* had notice of the fraudulent and illegal character of the tax deed, and was not a *bona fide* purchaser for value.

It appears from the findings, among other things, that the plaintiff and the defendant Webster were formerly the owners of the premises in question, having purchased the same of Dexter Owen April 20, 1883. That August 27, 1883, plaintiff sold his undivided interest to the defendant Webster, said Webster then and there assuming and agreeing to pay the two mortgages then on said premises. That the conveyance of plaintiff's undivided half, at the request of Webster, was made to his son, Frank S., though the consideration was paid by the defendant W. L. Webster, and his son Frank never paid anything toward the purchase and had no interest in the farm; plaintiff taking from said Frank Webster and wife, at the request of W. L. Webster,

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a mortgage upon the farm for $1,750, in part payment. The mortgages in question were all duly recorded, and remain unsatisfied. The defendant Webster, at the time, alleged as a reason for making the conveyance to his son, that there were outstanding claims against him. The defendant W. L. Webster, as part consideration for the conveyance of the plaintiff's interest in said farm, assumed and agreed to pay the said mortgages then upon it, and the deed so executed at his request to his son, Frank, contained a provision whereby the grantee in said deed assumed and agreed to pay them. About thirty days afterwards, September 20, 1883, Frank S. conveyed said farm to his mother, the wife of the said W. L. Webster, and she, on the 11th of January, 1888, conveyed the same to her brother, and brother-in-law of W. L. Webster,— E. H. Blodgett. W. L. Webster, from the time he so purchased of said plaintiff until the date of his conveyance to the defendant *Wilkinson*, September 12, 1890, was, through his tenants and otherwise, in the possession of and exercised full control over the said farm and premises. That in the mean time he leased the same to various tenants in his own name. That after such sale said land was assessed to said W. L. Webster, and he paid the taxes upon the same for several years, but omitted to pay the taxes of 1886, and, as before stated, obtained a tax deed of the premises for the taxes of that year, and about twenty days thereafter made a warranty deed to the defendant *Wilkinson* for a recited consideration of $7,000, consisting solely of the release of a certain claim *Wilkinson* held against Frank S. Webster, who was his son-in-law,— having married his daughter,— for moneys advanced to the said Frank a long time prior to said conveyance, and which were stale claims, though they might have been collectible had they been enforced (yet the evidence was satisfactory to show that the said *Wilkinson* never intended to enforce them, but regarded them as advances to his son-in-law, the

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said Frank S. Webster), and the further consideration of the release of a certain chattel mortgage held by *Wilkinson* against the defendant W. L. Webster, and the notes thereby secured. That said last-mentioned claim had been given in the interest or for the benefit of Frank S., and that the statute of limitations had run against the notes at the time, and they were regarded as worthless by the parties; and the court found that the consideration paid by *Wilkinson* was merely nominal. In the month of July, previous to the execution of the tax deed, the plaintiff inquired of Webster if all the taxes upon the said premises had been paid, and was informed by him that they had been, with the exception of the taxes for the year 1890, which he agreed to pay, and plaintiff relied on such information and made no other inquiry in respect to said taxes. The plaintiff bought up two of the mortgages in question in 1888, and the third was given to him by Frank S. Webster in part payment of the purchase money of his interest in the farm. W. L. Webster and the defendant *Wilkinson* were acquaintances and somewhat intimate; both residing at Red Wing, about five or six miles from the said farm. Webster made repeated and frequent visits to the farm, and his control of it was open and notorious, and *Wilkinson* must have had knowledge of that fact and of the title to the premises; and the court found that he was not a purchaser in good faith; that the conduct of the defendant Webster was instigated by a desire to defraud the plaintiff and deprive him of the benefit of his security.

It was found that the only evidence of posting notices of the tax sale in question to be found in the office of the county clerk for Pierce county, or any other of the county offices, was an affidavit of the county treasurer, in which he states: "That I did make the notices of sale of lands for taxes, of which a true copy is herewith annexed, and did cause true copies thereof to be posted in four public

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places in said county more than four weeks prior to the day of such sale of lands for taxes, one of which copies was posted in a conspicuous place in my office in said county." The several forty-acre tracts were stricken off to one Strickland for $8.80 each. Notice of application for a tax deed thereon was given by W. L. Webster, as holder and owner of the tax certificates, to the said E. H. Blodgett, his brother-in-law, to whom the premises had been conveyed as aforesaid, and was served by the said Webster, then in possession and control of said premises through his tenant, one Perkins, and it does not appear that Blodgett was ever the occupant of said premises. Webster was in possession of the farm in 1886. J. D. Coger was carrying it on as his tenant. J. R. Perkins was in possession in 1890 under W. L. Webster. He testified that Webster, in respect to deeding the farm to Blodgett, said: "He wanted to get Coger off the farm, and tried to buy him off; his lease, he said, read he could stay there until he sold, and he said, 'I'll fix him. I will deed the farm to Blodgett. I will get him off, if it costs five hundred dollars.'" The said Perkins has remained in possession of the said premises, as the tenant of said Webster, ever since the date of the tax deed. Further, that there was no evidence to show that Blodgett ever paid anything for the premises, aside from the recital in the deed to him, or to warrant the finding that he ever exercised any control over said premises, or claimed to have any interest therein. That the conveyance from said Webster's wife to him was made at the solicitation and direction of said Webster, who was found to be the real party in interest in said premises ever since the purchase by him of the said plaintiff's undivided half interest. These findings appear to be abundantly sustained by the evidence.

In addition to the findings, the case contains no evidence to show that Frank S. Webster ever claimed any interest in said premises, or exercised any act of ownership over

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them or in relation thereto, or that he was ever conscious that the title to said premises had ever been conveyed to him, other than the fact that he conveyed the same to his mother; nor is there any evidence whatever to show that she paid any consideration for such conveyance. The evidence is clear and decisive that during all this time the defendant W. L. Webster was exercising acts of ownership over the premises, leasing the same from time to time, and receiving the rents and profits of the same. Evidence was given to show that the defendant Webster, in June before the tax deed was issued, in conversation with the plaintiff, told him he had had some talk with the defendant *Wilkinson* about helping him to pay the mortgages, and that they went down to *Wilkinson's* store, W. L. Webster saying, "We came in to talk about that farm across the river,—the Dexter Owen farm." *Wilkinson* said that he "had been buying a pretty heavy bill of goods, and had not money to put into it just then, but that the 1st of next month he would be able to help him, and that Frank Webster had been doing well and was going to help pay the mortgages off." That about the 1st of July they went to see *Wilkinson* again, and were told that he had not got the money he expected, but that he thought the 1st of September he would have money, without doubt, to pay it up, and wanted the plaintiff to figure up how much there was on the mortgages that he held, and that he made the figures and brought them to him (*Wilkinson*). These figures were produced in evidence, showing an amount due of $5,782.28, July 9, 1890. Afterwards, about the 1st of September, they went to see *Wilkinson*, and he said he did not know as he could do anything about it; that he would let them know in a few days. Plaintiff testifies: "I think it was somewhere from the 4th to the 8th of September, 1890, that I first learned they had got a tax deed, and I went to see *Wilkinson*. There was no one with me, but

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W. L. Webster was in *Wilkinson's* office. I went in, and asked Webster what this tax deed meant. Told him that he told me the taxes were paid. 'Well,' he said, '*that was everything he had, and he wanted to save something out of it for Eva*,' that is, Frank's wife," — defendant *Wilkinson's* daughter. But *Wilkinson* did not say anything about his having a deed. This was about the 8th or 9th of September.

A Mr. Bell testified to a conversation with Webster in October, 1890, in which he (Webster) stated that the plaintiff had tried to swallow him up, and that he had now got a tax title deed of the place, and he thought he could worry him some. "He said he guessed now he had him, and if he got it back at all he would not get it back under a year." Mr. Hoard, another witness, testified that in the fall of 1890 Webster told him he had just obtained this tax title on the land. "He said he thought he had got *Perkins* now where he could kind of warm it to him. He said he had kept the thing quiet, and he thought he had got the thing completed now so that it was all right."

The defendant Webster, in testifying in relation to the interview between the plaintiff and himself at *Wilkinson's* store and in his presence, after he had got the tax deed, said that the plaintiff sat down beside him, and very confidentially says: "'Billy, you have got a tax deed on that farm, ain't you?' Said I, 'I have.' He said he didn't think I would do that on him, and that was about all there was of it, and went off." That "*Wilkinson* was at his desk, not near enough to hear the conversation, for the plaintiff was talking kind of low to me. I think he felt kind of bad, and did not want to talk loud. I couldn't tell you whether or not he was indignant. I think, perhaps, he was not. I don't know as he appeared to feel hurt, but I wouldn't be surprised if he thought it was a pretty mean trick. I would myself, but it don't make any odds what I thought."

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The plaintiff testified that he spoke in a loud tone of voice and in an indignant manner, and that *Wilkinson* was within three or four feet of them. The defendant Webster claimed that his connection with the farm, although he did the trading, was as agent for his son and for his wife, etc.; and it appeared that the plaintiff and Webster had been partners in the livery stable business, and a half interest in the livery stock and premises was traded to Owen by the plaintiff and defendant for the farm. Plaintiff testified that W. L. Webster and himself owned the property together, but it appeared that the title to an undivided half of the lot was in Frank S. Webster, though they never paid him any rent for it.

The defendant *Wilkinson* did not deny the interviews between himself and the plaintiff when he came to see him about the mortgages on the Dexter Owen farm, during the summer of 1890. He said that the plaintiff tried to induce him to buy his claim on that farm. He denied that Webster was with him on either of these occasions. In respect to the claim against W. L. Webster, part of the consideration for the conveyance to him, he said: "It is pretty hard to say what that obligation was worth. I don't know whether or not it was collectible. That is something I can't tell." That the judgment which he had recovered against Frank was discharged, and the notes surrendered up to Webster. That judgment was obtained when he supposed Frank had abandoned his family. "The relations between Webster's family and mine were such that I did not force the matter at all." That he did not pay any money on the purchase. That the mortgage against W. L. Webster had not been renewed, and had ceased to have any force. He did not know where the property was, covered by it, but supposed it had passed out of existence long ago. That Frank Webster was in Montana, and had been there for several years,—four or five. His wife is now living

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with him there. That matters were arranged so his wife returned to him. "That he did not know whether he would have enforced that judgment, as long as things were harmonious and right. He could not say. Could not say that he would never have used it if he had not had a chance to go into this scheme about the farm."

Judgment was rendered, setting aside and canceling the tax deed in question, and the said deed from Webster to the defendant *Wilkinson*, as against plaintiff's mortgages and so far as the plaintiff's rights thereunder were concerned, and declaring the same null and void. The defendant *Wilkinson* appealed.

The cause was submitted for the appellant on the brief of *J. S. White*, and for the respondent on that of *Albert Combacker*, attorney, and *Clapp & Macartney*, of counsel.

PINNEY, J. 1. It is plain that the defendant Webster occupied such a relation to the lands in question and to the plaintiff, as the owner and holder of the three mortgages thereon, that it became and was his duty to have paid the taxes for which they were sold in 1887 and deeded to him by tax deed in 1890. The procuring by him of the tax certificates of sale and tax deed thereon operated as a redemption of the lands, as between the plaintiff and Webster, so that as between them the tax deed, as an instrument of title, was void. Webster was the real beneficial owner of the land for over seven years, with an apparent legal ownership at times in different other persons, evidently to better promote plans and purposes which he may have intended to carry out in respect to third parties. The farm had been purchased with his means, and it was substantially all he had, as he told the plaintiff. As landlord he was bound to pay the taxes, though the land was actually occupied by his tenants or croppers under him. The collector, under his warrant, could enforce payment of the taxes as against

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them, and by sec. 1154, S. & B. Ann. Stats., they could recover the amount against him, with twelve per cent. interest, or they might retain the same out of the rents. For all purposes of taxation, he was in possession, and he was claiming title to the farm. He had agreed to pay the two elder mortgages as a part of the consideration for his purchase, and was therefore, as between him and the plaintiff, who held them, bound to pay the taxes. The cases are numerous, in this state and elsewhere, in support of the general proposition that no one can acquire a valid tax title founded upon a sale for taxes which it was his duty either legally or equitably to pay, and enforce it as against any person who would be prejudiced by his neglect. Black, Tax Titles, § 556; *Smith v. Lewis*, 20 Wis. 350; *Avery v. Judd*, 21 Wis. 264; *Bassett v. Welch*, 22 Wis. 175; *Whitney v. Gunderson*, 31 Wis. 379; *Fallass v. Pierce*, 30 Wis. 443; *Newton v. Marshall*, 62 Wis. 8. Webster recognized his liability to pay these taxes, and falsely and deceitfully represented to the plaintiff that the taxes in question had been paid, with the intention of preventing him from making redemption while yet it was in his power, so that he (Webster) could work out his scheme to fraudulently cut off the plaintiff's mortgages. After having succeeded in thus deluding the plaintiff and obtaining the tax deed, he twice openly boasted of the success of his scheme, and had the assurance to testify on the stand, in open court, that he "thought it was a pretty mean trick, but it didn't make any odds what he thought." It is needless to search further for evidence that the tax deed in question was the result of a deliberate and outrageous fraud.

2. The circuit court very properly held that *Wilkinson* was not an innocent purchaser. He knew perfectly well of the existence of these mortgages, and that Webster claimed to be anxious to pay them. The "intimate relations between the families" had, no doubt, made him fa-

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miliar with the possession and control W. L. Webster exercised over the premises, coupled with his claim of ownership of this large and valuable farm. He makes no denial of these facts. He occupies the novel position of a party who claims to be a *bona fide* purchaser, for $7,000, of this property, under no other claim of title than a tax deed not thirty days old, and which was only *prima facie* evidence of title, and the effect of which might, and most probably could, be readily destroyed. It has been thought that a purchaser from the grantee in such a tax deed could not, as a matter of law, be esteemed a *bona fide* purchaser. *Curtis v. Cisna*, 7 Biss. 260. *Wilkinson*, with the facts before him, was charged with knowledge that the tax deed to Webster was fraudulent in law and in fact, for he could not but understand from these facts that Webster had procured the deed in violation of his manifest duty to have paid the taxes, and for the obvious purpose of cheating the plaintiff out of his mortgage debts. The evidence fairly leaves the case open to the inference that he was only a too willing instrument to enable Webster "to save something for Eva" (*Wilkinson's* daughter) at the expense of the plaintiff's rights, and that the encouragement he held out from time to time to the plaintiff that he might buy his mortgages, until Webster and himself had secured, or had within easy reach, this tax deed, was a part of a concerted plan between him and Webster to defeat the plaintiff's mortgages. He has not parted with anything of material value, or with any claim that the evidence shows that he ever really expected to enforce. With the knowledge of the facts and circumstances which he had, it seems to have been a very reprehensible scheme. He had, at least, knowledge of the plaintiff's rights, and of facts and circumstances showing that the tax deed was fraudulent as against those rights.

The judgment appealed from must be construed in con-

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nection with the pleadings, and it is clear from it that the tax deed and conveyance to *Wilkinson* are canceled and set aside, and are hereafter to have no effect, so far as the plaintiff's rights under his said mortgages are concerned. This is the full scope and effect of the judgment.

This view of the case renders it unnecessary to consider whether the tax deed was void for want of proper proof of posting notices of the tax sale, and requires that the judgment of the circuit court be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

WELD and others, by guardian *ad litem*, Respondents, vs. THE JOHNSON MANUFACTURING COMPANY, Appellant.

November 29 — December 29, 1893.

Ejectment: Pleading: Amendment: Equitable defense: Counterclaim.

In ejectment against a corporation a proposed amended answer alleged that the lands had belonged to a firm consisting of plaintiff's ancestor and another, and had been left in the hands of the latter as surviving partner, as personalty subject to the firm debts, which were large; that in the settlement of the partnership affairs and for the continuance of the business said survivor had caused the defendant corporation to be organized, and had conveyed the lands to it in consideration of the payment of the firm debts, which it assumed. The judgment demanded was that plaintiffs take nothing by the action. *Held*, that the proposed answer was defective under sec. 3078, R. S., because stating an equitable defense without demanding, by way of counterclaim, a confirmation of the legal title in defendant, and that the court properly refused to allow it to be filed. [WINSLOW, J., is of the opinion that the allegations of the answer are insufficient to constitute either a defense or a counterclaim.]

APPEAL from the Circuit Court for *Waupaca* County. Ejectment. The facts are stated in the opinion.

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F. C. Weed, attorney, and *Geo. W. Bird*, of counsel, for the appellant.

For the respondents there was a brief by *M. C. Phillips*, attorney, and *Gary & Forward*, of counsel, and oral argument by *M. C. Phillips* and *George Gary*.

ORTON, J. This is an action in ejectment, brought by the plaintiffs, as the infant heirs of Julius T. Weld, deceased, by their guardian, against the defendant corporation, for the recovery of an undivided one-half of certain lands, by metes and bounds, in an addition to the city of New London. The defendant answered, after certain admissions, by a general denial. The cause was tried on such issue, and the plaintiffs recovered judgment. Within one year thereafter the judgment was vacated and a new trial granted under sec. 3092, R. S. Afterwards the defendant asked leave to amend the answer, and moved that an amended answer presented be filed and stand as the answer in the case. The court denied the motion, and the defendant has appealed from said order.

The amended answer, besides such admissions and general denial, sets up substantially the same facts as are stated in the counterclaim filed in an action between the same parties, and in another court, and which follows this case. *Weld v. Johnson Mfg. Co.*, *post*, p. 552. The same facts are pleaded as a defense to this as are pleaded as a counterclaim in that action. The answer is, in effect, that the lands sought to be recovered were, at the time of the death of the said Julius T. Weld, the partnership property of the firm of Weld & Johnson, composed of said Julius T. Weld and one R. S. Johnson, and were left in the hands of said Johnson as surviving partner, as personal property and subject to the payment of the debts of said copartnership; and that the partnership at that time was indebted in the sum of about $21,000; and that in the settlement of said

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partnership affairs, and for the continuance of the business of the concern, the said Johnson caused the defendant corporation to be organized, and conveyed said lands to the same in consideration of the payment of the debts of the firm, which said corporation assumed. The defendant demands judgment that the plaintiffs take nothing by this action.

This is unquestionably an equitable defense, and involves an accounting by said surviving partner, Johnson. Such an answer must contain a demand for such judgment as the defendant claims. R. S. sec. 3078. The answer must also be a counterclaim and demand a confirmation of the legal title in the defendant, so that the title and possession may be no longer separate. *Dewey v. Hoag*, 15 Barb. 365. There is another good reason for the rule. A court of equity should not be called upon to intervene in an action at law without being asked for some equitable relief, or to perform such fruitless labor as to merely defeat the action at law and leave the title in abeyance. But such is the statute, and that is sufficient. *Lombard v. Cowham*, 34 Wis. 486; *Du Pont v. Davis*, 35 Wis. 631; *Lawe v. Hyde*, 39 Wis. 345; *Stowell v. Eldred*, 39 Wis. 614; *Fuchs v. Treat*, 41 Wis. 404; *Dobbs v. Kellogg*, 53 Wis. 448. The amended answer was for this reason fatally defective, and the court did right in not allowing it to be filed.

By the Court.— The order of the circuit court is affirmed.

WINSLOW, J. I concur in the result in this case because, in my judgment, the allegations of the answer are insufficient to constitute either a defense or a counterclaim.

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WELD and others, by guardian *ad litem*, Appellants, vs. THE JOHNSON MANUFACTURING COMPANY, Respondent.

November 29, 1893 — March 16, 1894.

Partnership: Conveyance of land by surviving partner to corporation formed to continue business: Payment of debts: Ejectment by heirs of deceased partner: Counterclaim: Demurrer: Accounting.

1. In ejectment by the heirs of a deceased partner against a corporation for an undivided half of partnership lands which had been conveyed to it by the surviving partner, the answer alleged, as a counterclaim, that at the time of the death of plaintiffs' ancestor the indebtedness of the firm was about $21,000, and its assets consisted of the lands in question and other lands, and personal property worth not to exceed $10,000; that in order to pay said indebtedness and carry out the contracts of the firm it was necessary that its business should be continued; that the formation of a corporation, to which the firm property should be conveyed and which should assume said indebtedness and perform said contracts, was necessary for the accomplishment of said purposes and for the interest of plaintiffs, as heirs of the deceased partner, and of his estate, and to prevent a sacrifice of the property; that the defendant corporation was accordingly organized by the surviving partner and the administrator and widow of the deceased, said widow being also guardian of the plaintiffs; that all of the firm property was conveyed to the corporation, and in consideration thereof stock to the amount of over $10,000 was issued to the surviving partner and to plaintiffs' guardian for them, and $500 was paid to said widow; that the corporation has continued the business of the firm, and has applied all of its said property, to the full value thereof, to the payment of said $21,000 indebtedness. The prayer is that the title to the land be adjudged to be in the defendant, and that plaintiffs be adjudged to have no interest therein, etc. *Held*, that the counterclaim failed to show that such disposition of the lands by the surviving partner was a necessary or proper one in order to pay the debts of the firm, and hence failed to show that defendant was entitled to the relief demanded.
2. As the land was personal property in the hands of the surviving partner until the firm debts were paid, and plaintiffs could not, until then, recover possession of it, and as it does not appear that all of such debts have been paid, the answer is good as a defense, though not as a counterclaim. WINSLOW, J., dissents.

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3. Plaintiffs' remedy would seem to be, not by ejectment, but by an action for an accounting by the surviving partner, in which all persons interested should be made parties. Such an accounting could not be had in the ejectment action, because of the absence of necessary parties, and the counterclaim could not be amended so as to bring them in.

4. Plaintiffs having demurred to the counterclaim, and the facts stated therein being held to constitute a defense, an order striking out the demurrer is affirmed. ORTON, J., and LYON, C. J., dissent.

APPEAL from the Circuit Court for *Brown* County.

Ejectment. The facts are stated in the opinion. The plaintiffs appealed from an order striking out their demurrer to a counterclaim in the answer.

For the appellants there was a brief by *M. C. Phillips*, attorney, and *Gary & Forward*, of counsel, and oral argument by *M. C. Phillips* and *George Gary*. They argued, among other things, that by the transactions alleged in the counterclaim R. S. Johnson abdicated and waived his right to possession of the land in question as surviving partner. *Wellborn v. Coon*, 57 Ind. 270, 273–4; 2 Bates, Partn. sec. 717; *Griffin v. Spence*, 69 Ala. 393; 16 Am. & Eng. Ency. of Law, 1156. The defendant corporation, organized as it was to continue the business with the firm's assets, took no title as against the plaintiffs. *Tiemann v. Molliter*, 71 Mo. 512. When Johnson relinquished his possession of the land in dispute and all the property of the firm, and waived his right to wind up the partnership affairs, the plaintiffs, to whom the title descended subject to the claims of the creditors of the firm, were entitled to the possession, as the administrator did not take it. 1 Bates, Partn. sec. 293; *Martin v. Morris*, 62 Wis. 418; *Pierce v. Covert*, 39 id. 252; *Shanks v. Klein*, 104 U. S. 18; *Jones v. Billstein*, 28 Wis. 221; *Filbey v. Carrier*, 45 id. 469. The whole transaction was fraudulent and void as to these plaintiffs. See *Israel v. Silsbee*, 57 Wis. 222; *Hoyt v. Sprague*, 103 U. S. 613; *Francklyn v. Sprague*, 121 id. 215; *Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421.

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Geo. W. Bird and *F. C. Weed*, for the respondent, contended, *inter alia*, that the land in question was to be regarded as personal property of the firm within the exclusive control of the surviving partner, R. S. Johnson, who had the unquestioned right to manage and dispose of it, not only for the purpose of paying the partnership debts and distributing its effects, but for all proper and necessary purposes, needs, and requirements of the partnership. The facts stated in the counterclaim, therefore, constitute a good cause of action. *Shanks v. Klein*, 104 U. S. 18; *Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421; *Hoyt v. Sprague*, 103 U. S. 613; *Clay v. Field*, 34 Fed. Rep. 375; *Allen v. Withrow*, 110 U. S. 119; *Favill v. Roberts*, 50 N. Y. 222; *Williams v. Whedon*, 109 id. 333; *Evans v. Hawley*, 35 Iowa, 83; *Hewitt v. Rankin*, 41 id. 35; *Paige v. Paige*, 71 id. 318; *Van Aken v. Clark*, 82 id. 256; *Walling v. Burgess*, 122 Ind. 299; *Hanson v. Metcalf*, 46 Minn. 25; *Andrews' Heirs v. Brown's Adm'r*, 21 Ala. 437; *Murphy v. Abrams*, 50 id. 293; *Davis v. Smith*, 82 id. 198; *Dupuy v. Leavenworth*, 17 Cal. 262; *Bird v. Morrison*, 12 Wis. 138, 153; *Fowler v. Bailey*, 14 id. 125; *Pierce v. Covert*, 39 id. 252; *Bergeron v. Richardott*, 55 id. 129; *Martin v. Morris*, 62 id. 418; *Riedeburg v. Schmitt*, 71 id. 644, 651; *Fisher v. Vaughn*, 75 id. 609; *Kruschke v. Stefan*, 83 id. 373.

The following opinions were filed December 29, 1893:

ORTON, J. This is an action in ejectment, brought by the minor heirs of Julius T. Weld, deceased, by their guardian *ad litem*, to recover from the defendant corporation the possession of an undivided one-half of certain lands in town 27, range 13 east, and $500 damages and $3,000 special damages for cutting and removing valuable timber from the premises and converting the proceeds thereof to its own use. The answer alleges:

First. That the defendant is the owner and entitled to the possession of the premises.

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Second. As a counterclaim, that the said Julius T. Weld, deceased, and one R. S. Johnson, were copartners on the 22d day of July, 1888, and had been for six or seven years, engaged in the business of manufacturing and selling lumber, etc., under the firm name of Weld & Johnson; and that the lands described in the complaint were purchased by said firm with its partnership funds, and were used by it in connection with and to enable it to carry on its said business, and were a part of the said firm's partnership property at the time of the said Weld's death.

Third. That the indebtedness of said firm at the time last aforesaid amounted to about $21,000, and its assets consisted of said lands and other lands, also its partnership property, situated in the counties of Waupaca and Shawano in this state, and stock and personal property of the value of not to exceed $10,000.

Fourth. That at the time of said Weld's death said firm were under contracts with different persons and companies for the manufacture and delivery of a large quantity of lumber during the then coming year, upon which contracts had been advanced to it about the sum of $5,300.

Fifth. That in order to pay the said indebtedness and perform said engagements it was necessary that its business should be continued without interruption.

Sixth. That said firm was then without money or available means to accomplish said purposes, and the only satisfactory means to carry on and continue said business and obtain the necessary funds therefor was the formation of a corporation, to which should be conveyed all the property of said firm, and which should assume the payment of said indebtedness and the performance of said engagements; and the formation of said corporation was necessary for the accomplishment of said purposes, and for the interest of the plaintiffs, as the heirs of the said Julius T. Weld, deceased, and of said estate, and to pay the debts and prevent a sacrifice of the property.

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Seventh. That thereupon said R. S. Johnson, surviving partner, Amos Rugg, administrator of said estate, and Ada L. Weld, the widow of said Julius and guardian of said heirs, entered into an agreement that such a corporation should be formed under the general law of this state for the purpose of continuing said business and the payment of said indebtedness and the performance of said engagements; and to enable it to do so, that all the property of said firm, including said lands, should be conveyed to it.

Eighth. That the interests of the surviving partner and of the estate should be ascertained, and thereafter represented by stock in said corporation.

Ninth. That in pursuance of said agreement the said Ada L. Weld, as guardian of said plaintiffs, conveyed to the said R. S. Johnson, surviving partner, all the interests of said plaintiffs in the said lands in October, 1888, by guardian deeds, and at the same time the said Ada conveyed all her interest therein as the widow of said Julius to the said Johnson, so that he might convey said interests to said corporation when formed.

Tenth. That the said corporation was duly formed according to the laws of this state by the name of the *Johnson Manufacturing Company*, and on the 14th day of February, 1889, the said Johnson delivered to the defendant a warranty deed theretofore duly executed by him to said defendant, whereby he duly conveyed to the defendant corporation all of the aforesaid lands of the firm; and thereupon said defendant took possession of all the said property of said firm.

Eleventh. That the interest of said Johnson in said firm and the interest of the plaintiffs were duly ascertained to be as follows: R. S. Johnson, $5,645.91; the estate of the plaintiffs, $4,694.61, and the stock of said corporation was duly issued to them accordingly, and the stock of the plaintiffs delivered to the said Ada L. Weld as their guardian; and there was also paid to her, in lieu of stock, the

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sum of $500; and that the only consideration of said stock and said $500 was the conveyance to said corporation of said lands and property of the firm.

Twelfth. That said corporation has continued said business by the consent of all parties concerned, performed the engagements of the firm, and applied all of its said property, to the full value thereof, to the payment of said $21,000 indebtedness.

The prayer is that the title to the premises be adjudged to be in the defendant, and the plaintiffs be adjudged to have no interest therein, and the title be quieted in the defendant, and the plaintiffs be required to release and quitclaim to the defendant all right, title, and interest claimed by them in the premises, and for other and further relief and for costs.

To this counterclaim the plaintiffs demurred on the ground that it does not state facts sufficient to constitute a counterclaim, and on other grounds; and on motion of the defendant said demurrer was stricken from the files as being frivolous, which is tantamount to overruling it, and the plaintiffs have appealed.

1. The counterclaim fails to show any necessity for such a disposition of the said lands. First, it does not show the exact amount of the indebtedness of the firm, and what it consists of, and when due; second, it does not show the specific values of these lands or the "other lands," or what were the other lands, or what was the amount or value of the partnership property in the counties of Waupaca and Shawano; third, the corporation paid back in stock, money, and property, after the payment or assumption of the $21,000, to the amount of $10,840.52,— more than half of the debts,— which shows that there was no necessity of selling at least half of these lands; fourth, if it had been shown what the value of the "other lands" and the value of the partnership property in those two counties were,

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added to or including the stock and personal property of the value of $10,000, it might, and probably would, have shown that there was no necessity of selling any of these lands; fifth, it fails to show what were the property and assets of the new corporation directly after it commenced business, and the value thereof. It fails to show what advantage it was to the estate or the heirs to continue the business of the firm in this way, and how much profit and advantage it was to the said R. S. Johnson, the surviving partner.

2. The counterclaim shows that these lands have been disposed of in violation of law. First, the guardian and the administrator had no authority to enter into such a questionable scheme on behalf of the heirs or the estate; second, the surviving partner had no right to convert these lands into stock of the corporation; third, it does not show that any of these lands were *sold* to pay debts, and does not show that they were ever offered for sale in market. But it does show that the said surviving partner, Johnson, has converted them to his own use in the name of the corporation as his instrument. Who are the directors or officers of the corporation, if there are any besides himself? This whole scheme is vague, indirect, circuitous, and utterly unsatisfactory as an accounting for these lands, as well as for the other property of the firm, and of their disposition to pay the indebtedness of the firm. There is a concealment of facts in this pleading that raises a suspicion of fraud. The guardian had no right or authority to convey these lands, or the interest of the heirs therein, to Johnson; and Johnson had no title to convey to the corporation, other than that of a surviving partner. The counterclaim does not state how much of the indebtedness of the firm of $21,000 has been paid. It only shows that all the property has been *applied* to the payment of the indebtedness of the firm, and that might be, and only a small part of it

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paid. What were those contracts of the firm, and with whom, for the manufacture and delivery of lumber, and how much was finally received by the firm on them beyond the advancement of $5,300? By the doctrine of equitable conversion these lands were *personal property*, but only so to pay the debts of the firm. They were to be held by the surviving partner in trust only for that purpose alone, and the surviving partner will be held, like other trustees, to a strict performance of that trust; for, beyond the payment of the debts and the adjustment of equities between the partners, these lands are real estate, and belonged to the heirs, and will descend as such. The heirs may therefore hold the surviving partner to a strict account for the execution of this trust. If these lands are not necessary for the payment of the debts of the firm, they are real estate to all intents and purposes, and no more of them than are necessary for such purpose can be sold. The answer, as a counterclaim, fails to show any right to the relief demanded, and the demurrer should have been sustained.

For such an accounting as the plaintiffs have the right to demand, the presence of other parties is necessary. R. S. Johnson, the surviving partner, must be present, to account for his management of this trust; Ada L. Weld, the widow, and as guardian, must be present; and also Amos Rugg, the administrator. The counterclaim cannot be amended so as to bring in other parties. *Call v. Chase*, 21 Wis. 511; *McConihe v. Hollister*, 19 Wis. 269; *Pennoyer v. Allen*, 50 Wis. 308. The demurrer is therefore fatal to the counterclaim. But by the above authorities the answer may be good as a defense to the action, if not as a counterclaim. The answer shows that these lands were purchased by the partnership means, and used for partnership purposes, and were, therefore, partnership personal property, to be used in the payment of the partnership debts. In such case they are personal property so long as the debts of the firm

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remain unpaid. The answer further shows that at the time of the death of Julius T. Weld the firm of Weld & Johnson owed $21,000. The answer does not show that all of this indebtedness has been paid. Until it is paid these lands will remain as personal property in the hands of Johnson, the surviving partner, and the plaintiffs cannot recover the possession of the same in this action. It follows that the answer to that extent shows a good defense to the action. If the answer in this respect is true, the plaintiffs cannot recover. But, of course, the plaintiffs may proceed to the trial of this issue, as they may be advised.

This case appears to be in such condition as to justify this court in suggesting the proper way in which all of these matters may be adjusted. It is certainly for the interest of these heirs to ascertain as soon as may be what part of these lands, if any, are necessary for the payment of the debts of said firm, and to have the partnership affairs closed up, so that their interest in these lands, if any, may be ascertained. The plaintiffs should commence a suit in equity against the defendant corporation, R. S. Johnson, Ada L. Weld, the widow and guardian, and Amos Rugg, the administrator, and pray for an accounting by the surviving partner, Johnson, of the disposition of the property of said firm, and of the partnership transactions generally since the death of Julius T. Weld. *Clagett v. Kilbourne*, 1 Black, 346, was an action of ejectment, and the defense similar to this, in which the court advised this course to be taken. The case is closely in point, and may properly be followed in similar cases. This will bring before the court all the facts of this scheme by which these lands have been conveyed to the defendant, which are not stated in the counterclaim, for the confirmation or setting aside of this disposition of the lands; and, if found to be wrong or without authority, the court may adjudge the set-

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tlement of the partnership affairs and, if found necessary, the sale of these lands, or so much of them as is required, to pay the balance of the indebtedness of the firm after the application of its other assets. If these lands, or any part of them, are not absolutely necessary for the payment of the debts of the firm, they should be released from the trust as soon as practicable, for the benefit of the heirs.

The doctrine of "equitable conversion," by which partnership lands remain personal property until the indebtedness is paid and the equities between the partners are adjusted, has grown into an elementary principle of law in this state, as shown by the following cases cited in the brief of the learned counsel of the respondent: *Bird v. Morrison*, 12 Wis. 138; *Pierce v. Covert*, 39 Wis. 252; *Bergeron v. Richardott*, 55 Wis. 129; *Martin v. Morris*, 62 Wis. 418; *Fisher v. Vaughn*, 75 Wis. 609; *Riedeburg v. Schmitt*, 71 Wis. 644; *Kruschke v. Stefan*, 83 Wis. 373. It appears also to be well established that the proper disposition of such lands by the surviving partner may be set up as a counterclaim in equity to an action of ejectment by the heirs or those holding under them. *Blodgett v. Hitt*, 29 Wis. 169; *Jarvis v. Peck*, 19 Wis. 74; *Grignon v. Black*, 76 Wis. 674; *Wilson v. Hooser*, 76 Wis. 387; *Weeks v. M., L. S. & W. R. Co.* 78 Wis. 501. The theory of the case contended for by the learned counsel of the respondent appears to be well supported by the authorities, and it fails in this case only because the counterclaim fails to state facts which show a proper and rightful disposition of these lands to pay the debts of the partnership. But in all such cases an accounting should be had, and in this case the necessary parties have not been brought in, and they cannot now be brought in by an amendment of the counterclaim. It is not a case, if the facts set up in the answer are true, to be brought by the heirs in ejectment, but should be by bill in equity for an accounting, as we have said before. The demurrer to

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the counterclaim as such should have been sustained, but it may stand as a defense to the action.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

ORTON, J. (*dissenting*). The plaintiff demurred to the answer as a counterclaim only, and the court ordered the demurrer stricken from the files as frivolous, thus sustaining the counterclaim. On appeal from this order this court held the counterclaim insufficient, and the writer of the opinion, as a matter of course, entered a *reversal* of the order; but a majority of the court, while agreeing with the opinion, directed an *affirmance* of the order as the proper judgment, and it is accordingly so entered. From this entry only, I respectfully dissent.

LYON, C. J. I concur with Mr. Justice ORTON.

WINSLOW, J. My views in this case are, in brief, as follows: The right of a surviving partner to dispose of the partnership real estate, so far as necessary to pay partnership debts and close its affairs, is undoubted. In this case the answer shows, to my mind, no such state of facts, but rather a conveyance to a corporation, composed of the surviving partner and the widow of the deceased partner, for the purpose of continuing the old business under a change of name, with the entire assets of the old firm. I think the surviving partner, as such, had no right to make such a conveyance, and that the corporation, having notice of the purpose, acquired no title to the real estate in question thereby. However, the majority of the court were of opinion, as I understand it, that the equitable defense stated in the answer (as prescribed by sec. 3078, S. & B. Ann. Stats.), while insufficient in this action to be the basis of

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affirmative relief, especially in the absence of essential parties, is still sufficient to defeat this action of ejectment, leaving the parties to litigate their equitable rights in an appropriate action in equity, when all the necessary parties may be brought before the court. Under this view of the law it seems clear to my mind that the proper judgment is that of affirmance.

A motion for a rehearing was denied March 16, 1894.

THE STATE EX REL. FREE HIGH SCHOOL BOARD, etc., Respondent, vs. LAMONT, Town Clerk, Appellant.

November 30 — December 29, 1893.

Free high schools: Powers of board: Mandamus: *Levy and collection of taxes: Apportionment of amount.*

1. The board of a free high school district may institute a proceeding by *mandamus* to compel the levy and collection of a tax for the support of the school.
2. If the amount to be raised by a town in a joint free high school district is legally apportioned to it, the town clerk must include such amount in the tax roll, notwithstanding any direction to the contrary by the town board or by the electors at a town meeting.
3. The refusal of any number of towns, less than the whole number, in such district to levy and collect taxes for their respective shares of the expenses of the school, cannot disorganize or dissolve the district or relieve any town clerk of his duty to insert the proper sum in the tax roll.
4. The fact that the school-house is in a city is of no significance if the city is a part of the district.
5. The apportionment of the amount to be raised for the support of the school is not invalidated as to any town in the district by the fact that it was made on the basis that a town not in fact a part of the district was embraced therein.
6. The fact that the board, when making the apportionment, did not have before it certificates of the clerks of the several towns stating the equalized valuation of taxable property therein, is immaterial.

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APPEAL from the Circuit Court for *Clark* County.

On the petition of the district board of a joint free high school district, alleged to comprise the towns of Hull, Colby, and Green Grove and the city of Colby, in the counties of Clark and Marathon, an alternative writ of *mandamus* was issued out of the circuit court of Clark county to *John F. Lamont*, town clerk of the town of Colby, commanding him to insert in the annual tax roll of that town a tax on the taxable property therein, to pay the proportionate share of the town for the support of the school in such district as fixed and apportioned by the district board thereof, or to show cause to the contrary.

It is stated in the petition (and the same averments are recited in the alternative writ) that in 1885 a joint free high school district, comprising the town of Hull in Marathon county, and the town of Colby in Clark county, was created and organized in the manner required by the statute in that behalf (S. & B. Ann. Stats. secs. 490–492); that in 1887 the town of Green Grove was organized, and all the territory comprised in it was taken from the town of Colby; and that in 1891 the city of Colby was created out of portions of the towns of Hull and Colby.

After stating the names and offices of the persons constituting the district board of such joint free high school district, the petition avers the assessment of the school tax in question as follows: "On the 3d day of September, 1892, the said high school board met and determined that the amount of money necessary to be raised by tax for the support of said free high school for the then ensuing year was the sum of $650, and thereupon duly certified the said amount, together with the proportionate share of said amount to be raised by the said town of Colby, to wit, the sum of $242.55, and then and there caused the proper certificates of the board certifying the same to be delivered to the clerk of said town of Colby, as provided by law; and

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the said proportionate share was ascertained and determined according to the total value of all taxable property of said town, as equalized by the town board of review." It also avers that the town clerk of Colby (*Mr. Lamont*) was duly requested to insert a tax to that amount in the annual tax roll of his town, but he refused to do so.

A motion by *Mr. Lamont* to quash the alternative writ of *mandamus*, for the alleged reason that it fails to state sufficient facts to authorize the issuing of the writ, was denied. Thereupon he made return to the writ. His return is, in substance, that he refused to insert such district tax in the annual tax roll of his town because the electors thereof, at the then last annual town meeting of his town, directed him by resolution not to insert such tax in the tax roll, and the board of supervisors of the town gave him the same direction; also, that the school-house of the district is in the city of Colby. *Mr. Lamont* further answered that the district board did not have before it, or on file with the district clerk, any certificate of the town clerk of Colby, Hull, or Green Grove stating the amount of the equalized valuation of the taxable property therein.

To such return the school district board interposed a general demurrer, which was sustained, and judgment was thereupon awarded and entered that a peremptory writ of *mandamus* issue as prayed in the petition. The town clerk appeals from such judgment.

The cause was submitted for the appellant on the brief of *O'Neill & Marsh*, and for the respondent on that of *R. J. MacBride*.

For the appellant it was contended, *inter alia*, that the high school board is not a body corporate and cannot be the relator in *mandamus* proceedings. Any action in court relating to the property or interests of high school districts must be brought in the names of the towns composing the district. And if this be the case, no action can be main-

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tained without the authority of the electors. *State ex rel. Manitowoc v. County Clerk*, 59 Wis. 15; *State ex rel. Baraboo v. Sauk Co.* 70 id. 485.

LYON, C. J. In an action brought against the town of Green Grove by the same joint free high school district which is represented in this proceeding by its district board, this court approved the opinion expressed by Mr. Thayer, the late learned superintendent of public instruction, that our statutory free high school system "is crude, deficient, and complicated, and greatly needs revision." [*Joint Free High School District v. Green Grove*, 77 Wis. 532.] It is a satisfaction to know that under special authority of the legislature, conferred by ch. 178, Laws of 1893, it is now in process of revision by the present able superintendent. Doubtless, the imperfections of the system will disappear when the next legislature adopts the report of Mr. Wells. But, however imperfect the statutes in that behalf may be, certain legal inferences are clearly deducible therefrom, which control the determination of this appeal. These will now be stated, but they require little discussion.

1. A joint free high school district, if not a full corporation, is clothed with many corporate attributes and vested with important corporate powers. It is one of the legal civil subdivisions of the state, created to enable the state to perform properly one of its most important functions,—the education of its youth. Provision is made that its governing body or board shall have perpetual succession. S. & B. Ann. Stats. sec. 492. Such board may set in motion the taxing power of the state to raise money to support the high school (sec. 495), and generally may exercise the power and authority of ordinary school district boards (sec. 493), among which is the right to bring actions (sec. 417). The proper and efficient exercise of such large powers, and the right of the state or a citizen thereof to enforce

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performance by the district board of the duties imposed by law upon it or upon the district, render it absolutely necessary that the high school district or its governing board should possess the right to sue, and be subject to the liability of being sued, in the courts of the state; hence, whether the district or its board is or is not a corporation in the full sense of that term, or only a *quasi* corporation, it must be held that this proceeding was properly instituted and may be maintained by the district board.

2. Neither the town of Colby nor its board of supervisors has any lawful authority to interfere with the levy and collection of the tax in question, and the direction of the electors at the town meeting and of the town board of supervisors to the town clerk not to insert the tax in the tax roll are nullities. If the amount to be raised is legally apportioned to the town, the town clerk must include it in the tax roll.

3. The refusal of one town, or any number of towns (at least any number less than the whole), in a joint free high school district, to levy and collect taxes on the taxable property in any such town to pay its due proportion of the expenses of maintaining the school, when such proportion has been lawfully ascertained, cannot disorganize or dissolve the joint district, or relieve the town clerk of any such defaulting town of the duty of inserting the proper sum in the tax roll of his town.

4. The significance of the averment in the return that the school-house of the district is in the city of Colby is unexplained and is not apparent. Certainly, it is not significant if the city of Colby is a part of the district. That it is a part of the district admits of no reasonable doubt, for in the charter of that city (ch. 128, Laws of 1891) it is provided that nothing therein "shall be construed in any way to affect the boundary lines of any high school district;" and, further: "The joint school district shall remain as it

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now is until changed in legal manner." Subch. V, secs. 30, 32. These provisions expressly retain the city as a constituent part of the joint district. We do not determine whether it would or would not have remained a part of the district had those provisions been omitted from the chapter.

5. The petition shows quite clearly that the apportionment to the town of Colby of its share of the expenses of the school is made upon the basis that the town of Green Grove, as well as the city of Colby, is a part of the district. It is conceded that the circuit court has adjudged that such town is not a part of the district, and that such judgment is in full force, no appeal having been taken therefrom: hence Green Grove is not a part of the district. This fact, however, does not invalidate the apportionment of school expenses to the remaining towns and the city constituting the district. It only demonstrates that the apportionment to the town of Colby is too small. No harm is done thereby, except to the district, and the erroneous basis of apportionment is no sufficient ground for reversing the judgment.

6. It is quite immaterial that, when the district board apportioned to the town of Colby the amount to be raised therein by tax towards the support of the school, it had not before it the certificate of the town clerk of Colby stating the equalized valuation of taxable property therein, and had not like certificates of the clerks of the other towns in the district. If there is any statute requiring such certificates to be furnished (and we know of none), it is merely directory. Such certificates would furnish the board very satisfactory data on which to make the apportionment, but we find nothing in the statute which prohibits resort by the board to any source of information within its reach to obtain such data. The question is not, How did the board get the required information? but, Did it make the apportionment on the correct basis? That it did so in the pres-

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ent case, with the immaterial exception that it acted upon the hypothesis that Green Grove was a part of the district, is sufficiently alleged in the petition, and is not denied in the return.

The inevitable conclusion from the foregoing propositions is that the petition states sufficient grounds for issuing the writ of *mandamus*, and the return of the town clerk to the alternative writ fails to show any valid reason to the contrary. We hold that the peremptory writ was properly awarded.

By the Court.—The judgment of the circuit court is affirmed.

FAUROT, Respondent, vs. GATES, Appellant.

November 30 — December 29, 1893.

Suretyship: Contribution in action at law: Insolvency and nonresidence: Consideration.

1. Under our statute (R. S. sec. 2600) abolishing the distinction between actions at law and suits in equity, a surety who has paid the whole debt may recover in an action at law against his cosureties who are solvent and reside in this state the same contribution as if they were all of the sureties bound.
2. In an action by one guarantor of a note against another for contribution, the defendant cannot prove a want of consideration paid to the principal for a prior note which the note paid by plaintiff was given to renew.

APPEAL from the Superior Court of *Milwaukee* County.

The facts are stated in the opinion.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*. They contended, *inter alia*, that "one surety cannot recover contribution from another when the debt paid by the surety seeking contribution was either not binding on the princi-

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pal or not binding on the other surety." Brandt, Suretyship, § 232; *Warner v. Morrison*, 3 Allen, 566–8; *Lowndes v. Pinckney*, 1 Rich. Eq. (S. C.), 155–178; *Wells v. Miller*, 66 N. Y. 258; *Tobias v. Rogers*, 13 id. 59; *Russell v. Failor*, 1 Ohio St. 327. "At law a surety can recover from his cosurety an aliquot part calculated upon the whole number without reference to the insolvency of others of the cosureties." 1 Parsons, Cont. 34; *Easterly v. Barber*, 66 N. Y. 433, 439, 440; *Griffin v. Kelleher*, 132 Mass. 82.

For the respondent there was a brief by *Van Dyke & Van Dyke*, and oral argument by *George D. Van Dyke.*

ORTON, J. The basis of this action is the following note and guaranty:

"$1,500.00. Chicago, March 2nd, 1889.

"Three months after date, we promise to pay to the order of F. A. Bates, Fifteen Hundred Dollars, at Park National Bank here, value received, with eight per cent. interest.

"THE FUEL BURNER TRUST AGREEMENT,
"By F. A. BATES, Gen'l Mgr.

"For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at eight per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

"W. W. DONNELLEY,
"B. C. FAUROT,
"F. A. BATES,
"JAMES L. GATES."

A similar guaranty is signed by "R. R. DONNELLEY AND SONS, W. W. DONNELLEY, President."

This note and guaranty were given to replace and renew another note and guaranty which had been given before that time, and had been negotiated at the bank and the proceeds thereof applied to the uses of the trust, and which was then due and unpaid. They were delivered to the Park

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National Bank of Chicago, the holder of the former note, and said former note and guaranty were delivered up and retired. The bank assigned said note to one Oscar D. Witherell, and said Witherell commenced an action in the court of common pleas of Allen county, in the state of Ohio, against said guarantors, to recover the amount of said note, together with costs. The plaintiff was the only one of said guarantors upon whom service was had in said action; and having no defense to said action, as he was advised and believed, he paid said note, and all the interest thereon and costs of said action, amounting to $1,690.60, and no part thereof has been repaid to him. The plaintiff has been informed and believes that the said Fuel Burner Trust Agreement is now insolvent, and the said W. W. Donnelley, R. R. Donnelley and Sons, and F. A. Bates are now insolvent and nonresidents of this state. The plaintiff demands judgment against the defendant, as the other and remaining guarantor, for one half of said sum so paid, together with costs. This is substantially the complaint.

The material facts set out in the answer in defense of the action are that said note was delivered to one Packer, an officer of said bank, and that said first note was thereupon taken up and retired; that said first note was delivered to said Packer or the bank for the purpose of raising money for the purposes of said trust, but that said trust or the trustees thereof never received any sum of money whatever for said note, or any other consideration therefor, and that said note was without any consideration whatever,—and these allegations are substantially the same as to the second note or the one in suit; that said Packer delivered said last note to one Roberts, without receiving any consideration therefor, and said Roberts made an assignment for the benefit of his creditors to one Oscar D. Witherell, and said note came to the possession of said Witherell as the assignee of said Roberts, and without any other consideration.

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It is conceded that all the others of said guarantors, except the plaintiff and defendant, are nonresidents of this state, but the allegation of their insolvency appears not to have been sustained by the evidence. The allegations as to the suit in Ohio against the plaintiff as guarantor, and in favor of said Witherell as the holder of the note, and as to the payment of said note, costs, and expenses to the said Witherell by the plaintiff during the pendency of said suit, appear to have been sustained by the evidence. The defendant offered to prove that the said notes were delivered to said Packer or the bank without any consideration therefor to the maker thereof, as alleged in the answer; but, on objection of the plaintiff, said offer was rejected by the court, and the defendant excepted.

On the conclusion of the testimony the court directed the jury to find a verdict for the plaintiff for the sum of $949.80, this being one half of the sum paid by the plaintiff, with interest, and the defendant has appealed from the judgment thereon.

This is an action at law on the ground of an implied *assumpsit*, brought by the plaintiff as one of the guarantors, he having paid the whole note, interest, and costs, to recover from the defendant, as the only other *resident* guarantor, one half of the same.

1. The learned counsel of the appellant contends that in such an action the plaintiff can recover only an aliquot part of the whole note, regard being had to the number of the guarantors, without regard to the insolvency or nonresidence of any of them. This doctrine unquestionably obtained formerly in this country and in England; but now many of the states carry the equitable principles into actions at law, and make no distinction as to the action, whether at law or in equity. But in many of the states the strict doctrine of contribution in actions at law still prevails. Inasmuch as the right of contribution among sureties

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was first established as an equitable principle based upon and governed by the maxim that "equality is equity," it would seem most reasonable that the same principles which govern contribution in suits in equity should prevail as well in actions at law. According to the equitable doctrine, where one of the cosureties has paid the whole debt, he is entitled to contribution from such of his cosureties as are solvent and within the state. The insolvent and nonresident sureties are simply ignored. The nonresident is treated as an insolvent surety, and neither is a necessary party to a bill in equity for contribution; and so should it be, we think, in an action at law. 2 Suth. Dam. § 757; *Liddell v. Wiswell*, 59 Vt. 365; *Boardman v. Paige*, 11 N. H. 431; *Currier v. Baker*, 51 N. H. 613; *Bosley v. Taylor*, 5 Dana, 157; *Stewart v. Goulden*, 52 Mich. 143; Brandt, Suretyship, 292, Story, Eq. Pl. § 169; *Voss v. Lewis*, 126 Ind. 155; *Johnson v. Vaughn*, 65 Ill. 425; *Jones v. Blanton*, 6 Ired. Eq. 115. The same ultimate remedy for the defendant could be obtained after judgment in actions at law as in suits in equity. He could pursue the nonresident surety for the share he ought to have paid, or he could wait until the insolvent surety has property sufficient to pay his share, and obtain reimbursement from him. *Boardman v. Paige*, 11 N. H. 431. By our statute (sec. 2884, R. S.) the plaintiff can take judgment against one or more of the parties jointly or severally liable who were served with process, although there may be other persons so liable who were not served by reason of their nonresidence. Any ultimate right the defendant may have can be reserved as well after a judgment at law as in equity. *Stein v. Benedict*, 83 Wis. 611; sec. 2884, R. S. The equitable doctrine would appear as reasonable in an action at law as in a suit in equity, and not at all inappropriate to such an action. By the following authorities, as well as by the above, these principles of equity have been enforced in actions at law: 4 Am. & Eng.

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Ency. of Law, 4, and note; Wood's Mayne, Dam. 426; *Henderson v. McDuffee*, 20 Am. Dec. 559, and note; *Harris v. Ferguson*, 2 Bailey (S. C.), 397; *Burroughs v. Lott*, 19 Cal. 125; *Mills v. Hyde*, 19 Vt. 59; *Magruder v. Admire*, 4 Mo. App. 133; *Young v. Clark*, 2 Ala. 264; *Bushnell v. Bushnell*, 77 Wis. 436; 2 Suth. Dam. 576, 591. In England the judiciary act of 1873 has been held sufficient to destroy the distinction between actions at law for contribution and suits in equity for the same purpose. De Col. Guar. & Sur. marg. p. 307; Wood's Mayne, Dam. § 426; *Henderson v. McDuffee*, 20 Am. Dec. 561. Our statute (sec. 2600, R. S.) is very broad in its language abolishing these distinctions, as follows: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action for the enforcement or protection of *private rights* and the redress or prevention of private wrongs, which is denominated a civil action." See, also, sec. 2644, R. S., as to forms of pleading. These sections were applied in *Peterson v. Stoughton Bank*, 78 Wis. 119, where the ruling of the circuit court, declining to express an opinion whether the action was for money had and received or for tort, was held not to be erroneous; and in *Stein v. Benedict*, 83 Wis. 611, where Mr. Justice PINNEY uses the following language in his opinion: "Now that the circuit courts exercise legal and equitable jurisdiction in the same action, and *may grant any relief which* could formerly be obtained, *either at law or in equity*, there is no necessity whatever for instituting a second action, when to do so would only tend to a multiplicity of suits, which the law abhors." In view of our statutes, and this language as to their effect, we may well hold, in harmony with the above authorities, that in an action at law the principles of equity allowing a surety who has paid the whole debt to recover against his cosureties who are solvent and reside in this state the same contribu-

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tion as if they were all of the sureties bound, prevail. The verdict directed is according to these principles; the other guarantors being nonresident if not insolvent.

2. It is contended by the learned counsel of the appellant that the court erred in rejecting the offer to prove the want of consideration of the first note, and therefore of the second note also. This action is not brought on the note or on the guaranty. It is based upon the implied *assumpsit* or liability as between the guarantors, growing out of their relations to each other. This guaranty is of the payment of the *second* note. The original consideration was of the first note, and the original debt or obligation had already been incurred by the first note, and long before this guaranty was signed. It was therefore a separate, independent, and collateral undertaking, that must rest upon its own consideration, and the principal does not join in it. If not under seal, it must have an expressed consideration of its own. As in this case, it was "for value received." 9 Am. & Eng. Ency. of Law, 68, and many cases cited in note 2. "No question of consideration is involved in the contest between cosureties, for they enter into the undertaking without reference, as between themselves, to the consideration paid their principal. If his contract was entirely without consideration, the relative rights of these parties would be precisely the same, and on payment by one the right to contribution is called into existence." 1 Brandt, Suretyship, § 282; *Cave v. Burns*, 6 Ala. 780; *Fletcher v. Jackson*, 23 Vt. 581.

I have not specially considered the cases cited in appellant's brief apparently adverse to the cases and authorities above cited on the question whether the principles of equity should prevail in actions at law for contribution. We do not approve the reasoning of those cases, and prefer to follow the cases we have cited above, as being well considered and more reasonable. But we are disposed to hold

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that our own statute abolishing the distinction between actions at law and suits in equity is conclusive of the question. This disposes of all the questions raised on the argument.

By the Court.— The judgment of the superior court is affirmed.

THOMPSON, Administratrix, Respondent, vs. JOHNSTON BROS. Co., Appellant.

November 30 — December 29, 1893.

Master and servant: Death of servant caused by defective appliances: Assumption of risk by infant: Evidence: Instructions: Improper remarks of counsel: Damages.

1. The evidence in this case (showing, among other things, that the steel cable by which defendant's freight elevator was raised and lowered, and the drum on which the cable was wound, were near the edge of the elevator platform as it passed up and down and were unguarded, in violation of ch. 549, Laws of 1887; that the check lines by which the elevator was managed were so near to the cable that the person running the elevator might by mistake or inadvertence take hold of the cable instead of such lines, and, if he did so near the drum, would be in danger of having his hand or fingers taken off; and that plaintiff's intestate, a boy sixteen years old, who had been employed four days before to run the elevator, was found dead, jammed between the platform and the ceiling at the side of a hatchway, with his head near the cable, his arms outstretched, and two fingers torn off) is *held* to sustain special findings by the jury to the effect that the elevator was not a reasonably safe appliance, as respected the person employed to operate it; that its unsafe condition was the proximate cause of the intestate's death; that he was not of sufficient age and experience to comprehend the danger, and was not guilty of negligence; that he accidentally seized the cable instead of one of the check lines, before he fell upon the platform, and his hand was thereby drawn into the drum; and that defendant was negligent in permitting or causing the elevator to be used in its dangerous condition.

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2. Upon the evidence, it could not be held as a matter of law that the boy assumed the risk of any danger from the proximity of the drum and cable.
3. It was not a material error to permit an expert to testify that the drum should have been covered, since the statute so required.
4. The refusal to give instructions which were substantially embraced in the general charge is not error.
5. A judgment for plaintiff will not be reversed because of a statement by counsel that they could show that another man was caught in the drum, all evidence offered to show such an occurrence having been excluded.
6. In an action to recover damages for the death of a boy sixteen years old, evidence as to the pecuniary circumstances of his mother, a widow, and the number of her children, was admissible; and the jury in such case might take into account her reasonable expectation of pecuniary benefit from the continuance of his life, even beyond his majority.
7. An award of $1,700 in such a case is *held* not excessive.

APPEAL from the Circuit Court for *Milwaukee* County.

The defendant was, at the times hereinafter mentioned, and now is, a corporation organized under the laws of this state, engaged in carrying on the steam bakery and candy manufacturing business in Milwaukee. In the building in which the defendant transacted such business there was a steam freight elevator operated by the defendant. On March 21, 1890, the plaintiff's intestate, while in the employ of the defendant in running and operating said elevator, was killed. On March 1, 1892, the plaintiff was appointed administratrix of his estate, and thereupon this action was commenced, on the alleged ground that the said intestate was killed by the wrongful act, neglect, and default of the defendant. The defendant answered by way of admissions and denials, and alleged contributory negligence or carelessness on the part of said deceased.

At the close of the trial the jury returned a special verdict, to the effect (1) that the freight elevator of the defendant, upon which said intestate lost his life, was not a

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reasonably safe appliance, as respected the person employed to operate it; (2) that the unsafe condition of said elevator was the proximate cause of the intestate's death; (3) that the intestate was not of sufficient age and experience to comprehend the danger of operating said elevator; (4) that the intestate was not guilty of any negligence or want of ordinary care in the operating of said elevator which proximately caused, or contributed to cause, his death; (5) that the boy did not try to shut the elevator door with his foot, nor did he, while so doing, lose his balance and fall partly from the east side of the elevator platform, and so get caught between the platform and the floor before he could extricate himself; (6) that said intestate did accidentally seize the cable by which the elevator was moved up and down, before he fell upon the platform, instead of one of the "check lines," so called, and his hand was thereby drawn into the drum around which said cable was coiled; (7) that the defendant was guilty of negligence in permitting said elevator, or causing the same, to be used in its business without alteration in the respect in which the same was dangerous to the person operating it; (8) that, if the court should be of the opinion that the plaintiff was entitled to judgment, then they assessed her damages, in reference to the pecuniary injury to her from her son's death, at $1,700.

Judgment was rendered and entered upon said verdict in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

For the respondent there was a brief by *Toohey, Doerfler & Gilmore*, and oral argument by *John Toohey*.

CASSODAY, J. In his charge to the jury, the learned trial judge gives a description of the elevator in the following

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language: "As to the nature of this freight elevator, and as to its construction and the method of its management, there is no diversity of evidence. There is some little uncertainty as to some points, probably because the elevator has been burned up, and nobody remembers with accuracy in the matter of distances,—inches, feet, and the like; but the general features of the machine are before us upon uncontradicted evidence. It was a freight elevator, run by steam. It was used for carrying goods from the basement to the fourth story of the factory, not counting the basement as one story. It consisted of a platform six feet by five feet ten inches. It passed up and down through what I may call 'hatchways,'—that is, openings in the several floors through which it passed. It was lifted and lowered by means of a cable, which ran over a 'sheave,' as it is called, above the top of the elevator, and which was taken in and paid out by a drum situated between the first and second floors, not counting the basement, and attached to the ceiling of the first floor, suspended below that ceiling a short distance, and a short distance away from where the elevator passed up and down; the exact distance we are not advised of. Various witnesses have made various estimates of the distance, and you must judge as well as you can of the distance of that drum from the nearest edge of the platform as it passed by it, going up or down. That elevator was managed by means of two check ropes or check lines, which were situated in the northeast corner of the elevator,—on the north side, and near the east side. Near those two check ropes passed up the cable by which the elevator was lifted and lowered. It did not pass through the floor of the elevator, but passed just outside of the floor. According to some of the witnesses, a notch or partial opening was made in the side of the hatchway to make room for this cable as it played up and down. Precisely how near it was to the check lines, the evidence is not en-

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tirely agreed. Some of the witnesses placed the lines within about six inches of each other, and said that they were in a line one with the other. Another witness, however, said — and it must, in the nature of things, be true — that they were not exactly in line; that the check lines were a little south of the cable. This, I say, must have been true as to a portion of the space traversed by the elevator, because the cable, after passing through the second floor above the basement, coming down, was not continued down into the basement, but was carried off to the spool or drum and wound around it. On the east side of the elevator there was a door between the first and second floors, which was situated, according to the evidence, from one foot to sixteen inches beyond the space traversed by the platform, and east of it, that space being floored over at the bottom and ceiled over at the top. How it was on the other side, we are not advised, and it is immaterial."

It appears that the drum mentioned was iron, and about twenty-two inches in diameter; that it was suspended by iron braces on the north side of the elevator, and ran east and west, parallel with it; that it was from five to eighteen inches out from the edge of the floor of the elevator as it passed by in going up and down; that as the elevator went up the drum took in the cable on the side towards the elevator by turning downward; that the cable was a steel cord, an inch or more in diameter, and as it was so taken up by the drum each coil would run into a spiral groove or crevice on the side of the drum towards the elevator, and beneath it; that between such spiral grooves or crevices there was a raised space of about a half inch; that the cable and drum were both open and exposed to the view and reach of the operator between the floors mentioned in the opinion; that as the elevator moved downward the drum turned the other way — that is, upward — and let out the cable; that

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the two check lines by which the elevator was manipulated were each five eighths of an inch in diameter, and on the side of the elevator towards the drum; that they were from six to nine inches from each other, and from two to six inches from the edge of the platform; and that the cable was from six to eighteen inches from the nearest check line.

It is conceded that, at the time he was killed, the plaintiff's intestate was a boy sixteen years of age. In regard to his death, the trial judge, in charging the jury, said: "There was nobody who saw this boy hurt or killed; nobody who saw him from the time he started up from the basement, or down from the top of the building, whichever it may have been, until after he was dead. . . . You will remember that he cried out twice. There is a difference in the evidence as to his first cry,— whether it was articulate or not. As to the second cry, all the witnesses agree that he cried out, 'For Christ's sake, stop the elevator!' All agree that he was found jammed up against the ceiling over the space east of the elevator shaft or platform. All agree that his head was towards the north, near the cables. All agree that one of his hands, at least, if not both of them, was outstretched, and that one of his legs was hanging over the east side of the elevator, and that the other was gathered up under him. All agree to the fact that two of his fingers were gone, and that one of those fragments was afterwards found upon the floor of the elevator, or the platform of the elevator."

The boy was killed on Friday. He had commenced running the elevator, as a business, the Monday previous. He had occasionally, as a volunteer, run that elevator before, and also one belonging to another party. There is no claim that the defendant or any one gave him any special instruction as to the running of the elevator or any danger connected with it. All agree that the cable and drum

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were unguarded and but a short distance from the edge of the platform of the elevator as it passed up and down.

Such is a general outline of the facts and circumstances presented by the record. Without going into details, but after a careful examination of the testimony, we are constrained to hold that the evidence is sufficient to support the several findings of the jury, and hence that the trial court properly refused to direct a verdict in favor of the defendant. In view of the evidence, we cannot hold that the boy assumed the risk of any danger from the proximity of the drum and cable. The jury found that the elevator was not a reasonably safe appliance, as respected the person employed to operate it; that the defendant was guilty of negligence in permitting or causing the elevator to be used in its then dangerous condition; and that the boy was not of sufficient age and experience to comprehend the danger of operating the elevator. The statute in force then, as now, declares that "all belting, shafting, gearing, hoists, fly-wheels, elevators and drums of manufacturing establishments, so located as to be dangerous to employees when engaged in their ordinary duties, shall be securely guarded or fenced so as to be safe to persons employed in any such place of employment." Ch. 549, Laws of 1887; sec. 1636*f*, S. & B. Ann. Stats. With the check lines so near the cable, and the cable and drum so near the elevator, it is very obvious that the boy might, through mistake or inadvertence, take hold of the cable instead of the check lines; and if he did so at or near the drum then it is very manifest that he was in peril of having his fingers or hand taken off. The jury found that the boy did accidentally so seize the cable instead of the check line, before he fell upon the platform, and that his hand was thereby drawn into the drum and his fingers taken off. It is certain that two of his fingers were taken off, and one of them was afterwards found upon the platform of the elevator. The

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facts are somewhat similar to those in *Chopin v. Badger P. Co.* 83 Wis. 192, and *Nadau v. White R. L. Co.* 76 Wis. 120.

Exception was taken because a manufacturer of elevators was allowed to testify, as an expert, to the effect that when the drum is located close to the operator as he passes up and down, then it naturally ought to be covered, and that he would have covered this one. The objection is that it was not a subject of expert testimony, but a question of fact for the jury. Assuming that such testimony might, under other circumstances, be objectionable upon the ground stated, yet in the case at bar it merely asserted what the statute quoted imperatively required the defendant to do, and hence could not have been prejudicial to the defendant. This is made imperative by another statute, which declares that no judgment shall be reversed by reason of any error which does "not affect the substantial rights of the adverse party." Sec. 2829, R. S.; *Olson v. Solveson*, 71 Wis. 663. We must hold that the error, if any, was immaterial.

The jury found that the unsafe condition of the elevator was the proximate cause of the boy's death. True, no one saw the accident. But the jury were justified in reaching such a conclusion from the facts and circumstances stated. In commenting upon the two theories advanced at the trial, the presiding judge well said: "Where evidence is purely circumstantial, the only correct theory is one which will take in all the known circumstances,—all the known facts. A theory, however well it may fit into a portion of the facts, is worthless, unless it will account for all the facts." The case, in some respects, is similar to *Hoye v. C. & N. W. R. Co.* 62 Wis. 666, 67 Wis. 1,—where there was an absence of any direct testimony as to how the woman came to be under the car where she was found.

Error is assigned because the court refused to instruct

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the jury that: "It is not enough that the plaintiff shows an act which you may find to be a negligent act, and which might or might not have been the proximate cause of his death; but the plaintiff must satisfy you, by preponderance of the weight of evidence, that such negligent act, if you find it to exist, was the cause of the accident which caused his death." As indicated, the court left it to the jury to say, in answer to the first question, whether the elevator was safe or unsafe; and in answer to the second question, if they found it to be unsafe, then whether such condition was the proximate cause of the boy's death. In that connection the court charged the jury that: "It is utterly immaterial whether the elevator was safe or not, if the plaintiff's intestate did not lose his life by reason of its unsafe condition." These portions of the charge covered all contained in the instruction requested, except as to the "preponderance of the weight of evidence." The court further charged the jury, upon this branch of the case, that: "As to the *first three questions* which I have read to you, *the burden of proof is upon the plaintiff. It is for her to show* that the elevator was dangerous, *and that by reason of its dangerous condition her son came to his death*, and that he was of such age and such want of experience as precluded his comprehension of the danger of the work about which he was employed. As to these three items, *the burden of proof is upon the plaintiff*." Thus it appears that the court did charge the jury substantially as requested.

Error is assigned because the court refused to instruct the jury that: "You are instructed that you are not at liberty to presume negligence on the part of the defendant in this action. Negligence must be proven, and in this case the burden of proof is upon the plaintiff to show that the defendant did, or omitted to do, some act or thing, the omission or commission of which directly contributed to the happening of this accident." It appears from what has

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already been said that the court did charge the jury substantially as here requested.

During the examination of one of the plaintiff's witnesses, he testified to the effect that there was no covering to the drum. Thereupon the following took place: *Defendant's counsel:* Wait a minute. That is objected to. *The court:* I shall leave that to the jury,— whether the drum was dangerous. *Plaintiff's counsel: We can show that there was another man caught in it, if they insist upon that.* (Objected to by defendant. The objection was overruled, and defendant's counsel excepted.) *Q.* Will you state whether or not that drum was covered? (Objected to by the defendant. The objection was overruled, and the defendant duly excepted.) *A.* That drum was not covered." There can be no doubt about the right of the plaintiff to prove the condition of the drum at the time. It is now contended that such rulings of the court expressly sanctioned the statement of the plaintiff's counsel quoted above and in *italics.* We do not so understand the record. Such rulings of the court were manifestly confined to the admission of testimony respecting the condition of the drum. The testimony given and offered to be given in that connection all related to the condition of the drum. Subsequently, the plaintiff's counsel sought to prove by another witness that while he was operating the same elevator his arm was caught by the same drum and injured, and that the witness thereupon refused to longer operate the elevator unless the defendant would cover the drum so as to make it safe, and that thereupon the defendant covered the drum. Such offers were, however, all excluded. For reasons which this court has repeatedly given, we cannot reverse the judgment on any such ground. *Laue v. Madison, ante,* p. 453, and cases there cited.

Error is assigned because the court allowed the plaintiff, a widow and the mother of the boy, to testify to the effect

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that she had had six children, but had only four then; that there was a mortgage of four or five hundred dollars on her homestead; and that her taxes thereon generally were $65, but that year $78. The right of action was, of course, given by statute. R. S. sec. 4255. The statute authorized the jury to "give such damages, not exceeding $5,000, as they" should "deem fair and just in reference to the pecuniary injury resulting from such death," to the plaintiff. Sec. 4256. The court charged the jury to the effect that the plaintiff would have been entitled to the boy's wages had he lived, until he became twenty-one, and no exception is taken to it. The court properly charged the jury to the effect that she could recover nothing additional unless they found, in view of her pecuniary circumstances, that she might have become dependent upon the son after his majority, and then only for the loss of support to which she might so have become entitled. The admission of such evidence and such charge are justified by the repeated decisions of this court. *Potter v. C. & N. W. R. Co.* 21 Wis. 375, 22 Wis. 615; *Ewen v. C. & N. W. R. Co.* 38 Wis. 622; *Johnson v. C. & N. W. R. Co.* 64 Wis. 425; *Tuteur v. C. & N. W. R. Co.* 77 Wis. 505; *Wiltse v. Tilden*, 77 Wis. 152. There can be no doubt that in such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life, even beyond his majority. *Ibid.* That depended upon her pecuniary circumstances, and the evidence admitted related directly to such circumstances. We cannot say that the damages found are excessive.

There are numerous other exceptions to the charge and the rulings of the court, all of which have received the careful consideration of this court, but it is believed that there is no reversible error in the record. We regard the charge of the court very full and fair throughout.

By the Court.—The judgment of the circuit court is affirmed.

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BRUNNELL, Respondent, vs. THE HUDSON SAW MILL COMPANY, Appellant.

November 30 — December 29, 1893.

Master and servant: Forfeiture of wages: Evidence: Knowlege of custom.

In an action for a balance due for work as a trimmer in defendant's saw mill, evidence of the terms of defendant's contracts with the other trimmers and of its custom to retain a part of the wages of its employees, to be forfeited by them if they should leave before the end of the sawing season, was not admissible in the absence of evidence that plaintiff had knowledge of the terms of such contracts or the existence of such custom.

APPEAL from the Circuit Court for *St. Croix* County.

The action was commenced before a justice of the peace to recover a balance of $14.85, alleged to be due plaintiff for work as a trimmer in the saw mill of defendant company, performed in 1892. The complaint alleges a contract by the company to pay plaintiff $1.65 per day for his work; that he worked under such contract 98¾ days, thus earning $162.93; and that he has received only $148.08 on account thereof.

The company in its answer admits the above allegations of the complaint, but avers that the contract of hiring contained the further condition that fifteen cents per day of plaintiff's wages should be retained by it until the close of the sawing season of 1892 (the balance of $1.50 per day being payable and having been paid monthly), and that if plaintiff left the service of the company before that time he should forfeit the fifteen cents per day. It is also alleged and admitted that plaintiff left the service of the company, without its fault, before the close of the sawing season.

On the trial before the justice, the foreman or manager of the company testified, in effect, that the contract of hir-

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ing was as stated in the answer. The plaintiff testified that the contract contained no such condition, but that, although the company kept back fifteen cents per day of his wages, he was entitled to be paid the same when he left its service, without regard to the time he might leave. The company offered testimony to show that the other trimmers who worked with plaintiff in the same mill worked under contracts like the contract alleged in the answer to have been made with plaintiff. Also that it was the custom of the company to keep back part of the wages of its men working in its mill, on like conditions. The justice rejected the testimony, and gave judgment for plaintiff for the amount of his claim.

The company appealed to the circuit court from the judgment of the justice. The case was tried in that court on the return of the justice, which included the above testimony, offers of testimony, and rulings. The circuit court affirmed the judgment of the justice, and from the judgment of affirmance the defendant company appeals to this court.

For the appellant there was a brief by *Bashford & Disney*, and oral argument by *J. W. Bashford.*

A. J. Kinney, for the respondent.

Lyon, C. J. Undoubtedly the testimony introduced on the trial, although in direct conflict on the material question in the case, to wit, the terms of the contract of hiring, is sufficient to support the judgment of the justice, and consequently the judgment of the circuit court affirming the same, so far as such affirmance rests on the facts developed by the testimony. The only question of law presented by this appeal is, Did the justice err in rejecting the offered testimony to prove the terms of contracts made by defendant company with other trimmers, and its custom to keep back part of the wages of its men working in the mills?

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No testimony was given or offered tending to show that plaintiff had any knowledge of the terms of such contracts with other trimmers or the existence of such custom. It requires no argument or citation of authorities to prove that in the absence of testimony of such knowledge the rejected testimony was inadmissible. It is very doubtful whether testimony of the terms of the contracts with the other trimmers would have been admissible, even though the plaintiff had knowledge thereof. *Kelley v. Schupp*, 60 Wis. 76, and cases cited in the opinion.

By the Court.— The judgment of the circuit court affirming the judgment of the justice is affirmed.

JENSON, Respondent, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

November 30 — December 29, 1893.

Railroads: Crossing above highway: Statutory regulations: Frightening horse on highway: Negligence: Speed of train: Instructions to jury: Damages.

1. The statutory regulations as to the rate of speed of trains and the giving of signals at or near highway crossings apply only to grade crossings.
2. In an action for injuries sustained by reason of a horse being frightened by a train which was running about fifteen miles an hour over a crossing above a highway, it was error to charge the jury that they should take into consideration the rate of speed of the train, and that it was negligence not to have rung the bell or blown the whistle.
3. In an action for personal injuries it was error to instruct the jury that they might allow reasonable compensation for the *inconvenience* as well as for the injury suffered by the plaintiff.

APPEAL from the Circuit Court for *St. Croix* County. Action to recover damages for personal injuries alleged

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to have been caused by the negligence of defendant and its servants. The facts are stated in the opinion.

Solon L. Perrin, for the appellant, argued, among other things, that the injury was not shown to be the natural and probable result of any negligent act or omission on the part of defendant, and that plaintiff, not having stopped and listened for the train, was guilty of contributory negligence. *Seefeld v. C., M. & St. P. R. Co.* 70 Wis. 216; *Schmolze v. C., M. & St. P. R. Co.* 83 id. 659, 667; *Butterfield v. Western R. Corp.* 10 Allen, 532; *Schofield v. C., M. & St. P. R. Co.* 114 U. S. 615; *Favor v. B. & L. R. Corp.* 114 Mass. 350; *Rheiner v. C., St. P., M. & O. R. Co.* 36 Minn. 170.

A. J. Kinney, for the respondent, contended, *inter alia*, that the crossing was an extremely dangerous one, and hence that the law required defendant's servants in charge of trains to approach it at a less rate of speed and use increased diligence in giving warning of their approach. *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; 1 Thomp. Neg. 422, sec. 5; *Roberts v. C. & N. W. R. Co.* 35 Wis. 679; *Guggenheim v. L. S. & M. S. R. Co.* 66 Mich. 150; *Voak v. N. C. R. Co.* 75 N. Y. 320; *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247. Although the statute does not require a whistle to be blown for this crossing, yet in view of its character and the liability of an accident happening there the jury had a right to find that it was negligence on the part of defendant to omit such a signal. *Cordell v. N. Y. C. & H. R. R. Co.* 70 N. Y. 119; 1 Thomp. Neg. 419, sec. 4; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; *Eilert v. G. B. & M. R. Co.* 48 id. 606; Rorer, Railroads, 1012–1014. The doctrine of *Favor v. B. & L. R. Corp.* 114 Mass. 350 (in which it was held that the Massachusetts statute did not require the whistle to be blown except where the highway was crossed at grade), was considered and exploded in

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Rupard v. C. & O. R. Co. 88 Ky. 280. See, also, *Penn. R. Co. v. Barnett*, 59 Pa. St. 259, 263; *Wakefield v. C. & P. R. R. Co.* 37 Vt. 330; *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, 184; 1 Thomp. Neg. 352, sec. 15; Id. 349, sec. 14; *Norton v. Eastern R. Co.* 113 Mass. 366. The running of the train, even at the statutory rate of fifteen miles an hour, might, under the circumstances, be negligence. *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; *Guggenheim v. L. S. & M. S. R. Co.* 66 Mich. 150; 1 Thomp. Neg. 418, sec. 2; *Linfield v. O. C. R. Corp.* 10 Cush. 562; *Richardson v. N. Y. C. R. Co.* 45 N. Y. 846.

ORTON, J. The facts of this case are substantially as follows: In the city of Hudson, and near the northeastern limits thereof, there is a highway or wagon road (the name of which is not given) that starts at the intersection of St. Croix and Eleventh streets, and runs in a northeasterly direction in a descending grade and through a deep cut until it passes under the railroad or railroad bridge over the same, of the defendant, and then passes on and constitutes the main highway from the city to the North Wisconsin Junction. After it has passed under the railroad bridge, and about seventy-two feet from it, there had been a washout that tore out an old culvert, and made a gorge or gully about twenty feet deep in a part of the road, which left the track quite narrow. There was a fence along the edge of this gorge. On the 1st day of October, 1892, the plaintiff was traveling along this road from said junction towards the railroad bridge, with his wife, in a single carriage. When he was passing or had just passed under said bridge, a freight train of the defendant passed over said bridge, and the noise frightened the plaintiff's horse and he became unmanageable and ran and jumped over said fence into the said gorge, and of course turned over the carriage and threw the plaintiff and his wife out, but, strange to

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say, with but slight injury to the plaintiff and no injury to his wife. It is difficult to say from the evidence whether the plaintiff was under the bridge when the train passed over it, or had passed beyond the bridge when the train passed over, for the plaintiff testified that he was going down the bank when he saw the engine, and that was over seventy feet from the bridge. It does not appear that this road was one of the streets of the city. It would appear to be a country highway leading to the city, for it seems to have no name or number. The train was running about fifteen miles per hour. There was no proof that the bell was rung or the whistle blown before passing over the bridge.

The learned judge instructed the jury that the statute required the bell to be rung at and before crossing, and that they should take into consideration the rate of speed that the train was running, and that it was negligence not to have rung the bell or blown the whistle. The jury must have found the defendant guilty of negligence in one or more of these particulars. The verdict for the plaintiff was $100. The court instructed the jury "that they could only allow the plaintiff a reasonable compensation for the *inconvenience* and injury he suffered from the causes named," and this was excepted to by the defendant's counsel.

It is a little remarkable that this case was tried both by the court and counsel precisely as if the accident had occurred at an ordinary railway crossing at grade with and intersecting a highway. The very best reason for constructing a railroad over or under a highway is to avoid the danger and hazards of such an ordinary grade crossing. Our statute (sec. 1837, R. S., and sec. 1299*c*, S. & B. Ann. Stats.) provides for constructing railways over bridges or arched culverts above highways. This bridge is presumed to have been constructed according to law. Such crossings are to be encouraged in order to secure the safety

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and security of the public, as crossings at grade are always dangerous. 19 Am. & Eng. Ency. of Law, 868, 869; *Pittsburg & C. R. Co. v. S. P. R. Co.* 77 Pa. St. 173. All the statutory regulations and liabilities on the subject of railroad crossings apply only to such as are constructed at even grade with the highway, and none of them are applicable to a crossing constructed above or below the highway. 4 Am. & Eng. Ency. of Law, 907; *People v. N. Y. C. & H. R. R. Co.* 74 N. Y. 302; *New York & N. E. R. Co. v. Waterbury*, 55 Conn. 19; *Central Vt. R. Co. v. Royalton*, 58 Vt. 234; *Clawson v. C. & G. S. R. Co.* 95 Ind. 152; *Whitcher v. Somerville*, 138 Mass. 454; *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 84. Common reason teaches that this crossing is very different from the common railroad crossing at the grade of the highway, not only in fact but in all its incidents and relations to the traveling public. There is no danger at such a crossing of any collision of railroad trains or cars with man, beast, or vehicle on the highway. It cannot be the direct cause of any physical injury to any person or thing on the highway. The train passing over this bridge can cause no injury to persons or property on the highway other than, or different from, their injury while passing on a highway parallel to the railroad.

The only possible injury a railroad train can inflict upon persons or property in the highway is by frightening horses while drawing vehicles or being ridden, and causing them to run away and do damage, as in this case. Only horses unused to such a place would be frightened, and only horses hard to hold or not well subdued would run away or get beyond the control of the driver; so that it is not common that any injury would happen even from this cause. It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge, or being near it at the same

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time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make less noise going over slowly than faster. What degree of noise must it make to frighten horses? A horse liable to be frightened would be by the train passing over the bridge at any rate of speed. There are too many contingencies, conditions, and uncertainties about it to make it a rule of law that a high rate of speed would be the proximate cause of an injury caused by a horse running away through fright from the noise of the train. To be a rule of law, the injury from such a cause must not only be proximate, but usual or common and to be expected, or that could be anticipated. There were probably a great many instances when horses passing under or near the bridge when a train was going over it were not caused to run away, or, if frightened at all by it, to such an extent. How could the company or its servants anticipate just when a horse would be frightened to such an extent, under such circumstances? This, so far as I know, is a new question, and I have said enough by the way of common reasoning, in the absence of authorities, to show that it would be an unsafe rule for the court to instruct the jury that they might consider the speed of the train, and find that its running at the rate of fifteen miles per hour was the proximate cause of the injury in this case.

We have seen that the statute as to the rate of speed of the train, and as to ringing the bell or blowing the whistle, has no application to such a crossing. All such regulations apply only to crossings on an even grade with the highway, and the rules of law established by the decisions of the courts are with reference only to such crossings. The danger from such bridges of frightening horses is no greater in fact, and no more common, than from the railroad running near and parallel to a highway. It would seem to be no

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more reasonable to establish a rate of speed for the trains in passing such places in one case than in the other. This bridging over highways should be encouraged, not only for the safety of the public, but for the benefit of railroad companies themselves, and for their protection also. They should be no longer burdened, obstructed, or inconvenienced by the regulations and precautions applicable to grade crossings. If they are required to lessen their speed, to ring the bell and blow the whistle, and use all the precautions applicable to grade crossings, such expensive constructions in the interest of the public will be gratuitous, and they will not be encouraged to incur such an expense. As to ringing the bell and blowing the whistle, they are only required, if at all, in order to avoid frightening horses, and with that view to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances; for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage. If he is to stop at a place further off, to look or listen for the train, then such a precaution would be useless, for the train is then so far off as to be out of sight or hearing. The sound of the bell or the whistle is only heard when the train is near a grade crossing, and it may well warn the traveler to stop near the track of the crossing, and be out of danger. Take this case as an illustration. The plaintiff was driving in a deep cut with high embankments. If, when he entered it, he had looked or listened, he could not have seen or heard anything of the train, for it was too far off. If he had stopped nearer the bridge, he could not have seen the train, nor could the trainmen have seen him. He could only expect the bell to be rung or the whistle blown when

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he was very near the bridge. Then the noise of either would only have increased the noise of the train, and frightened the horse still more, and his only safe way would have been to drive on. The negligence of the company, to be culpable, must have caused or contributed to produce the injury. When was there any such negligence in this case? We cannot find from the evidence that there was any.

The jury followed the instructions of the court, and ignored the fact that this was not a grade crossing to which the statutory regulations applied, and found negligence only appropriate to such a crossing. It was clearly a mistrial, by the trial of issues not in the case. A railroad bridge crossing was made to bear all the legal tests of a grade crossing that intersects the highway. I am unable to suggest what regulations, if any, ought to be provided for such a crossing by the legislature. It is so much like a highway near and parallel to the railroad, on which horses may be frightened by the noise and seeing the train pass by, that I am unable to suggest any regulations which ought not to apply to one as well as the other. This plaintiff knew when he entered the deep cut leading to the bridge that he had a horse liable to be frightened and run away if he should be caught near or under the bridge when the train passed over it, and yet he drove on, thinking, as he said, that he might be there when the train passed. He knew when he entered the deep cut that the train was then too far away to be seen or heard, for he says he looked for a train and did not hear or see any; and yet he drove on, more and more out of sight of an approaching train, and when he could have heard the bell or whistle it was too late. His horse had jumped over the fence when he first saw the locomotive. He did not wait or stop to look or listen, but took his chances and drove on. I am not sure but that the company might make itself liable for blowing

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the whistle and ringing the bell so near such a bridge crossing as to frighten teams passing under it on the highway. But that is not this case.

It is not very important to notice one erroneous *word* in the instructions of the court, where the whole general charge was so clearly erroneous. The court instructed the jury that they might allow a reasonable *compensation* to the plaintiff for the *inconvenience* as well as for the injury he suffered. The court might as well have told the jury to make the plaintiff's verdict large enough to compensate him for any disquiet, uneasiness, annoyance, or trouble he suffered, for these are inconveniences according to Webster; and they are not the subjects of compensation, although they might be of exemplary damages. The misuse of this word may have swelled the damages for this trifling injury to $100. It was, therefore, an error.

This case is not important in amount, but it certainly is important in the legal principles involved. Cases like this are not common, and it is at least doubtful whether there ought to be any like it.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

EVANS, Respondent, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

November 30 — December 29, 1893.

Railroads: Nuisances: Obstruction of street: Action by private person.

1. An instrument granting to a railroad company the right to construct, maintain, and operate its railroad in the street in front of the grantor's lot, "as the same was at the date of said instrument constructed," gave the company no right thereafter to destroy the street as a public highway in front of said lot.

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2. The construction and maintenance of a railroad along a street in such a way as to destroy entirely the use of the same as a public highway, is not authorized by statute (R. S. sec. 1828, subd. 5, and sec. 1836).

3. A complaint alleging that a railroad company has wrongfully and unlawfully used and occupied the street opposite plaintiff's lot in such a way as to completely obstruct all travel with teams thereon and to entirely destroy its use as a public highway, and has thereby prevented plaintiff's former customers, and other persons who would otherwise have done business with him at his warehouse and elevator on said lot, from having access to or egress from the same, and has thereby destroyed plaintiff's business and the value of his said premises, shows that plaintiff has suffered such special and peculiar damage as to enable him to maintain an action therefor, both at common law and under sec. 3180, R. S.

APPEAL from the Circuit Court for *St. Croix* County.

It is alleged in the complaint, in effect, that First street in Hudson is sixty feet in width, and runs north and south, and has existed for more than thirty years; that prior to May 17, 1879, the Hudson & River Falls Railway Company constructed, and was then operating, two railway tracks on the westerly side of said street at the place in question; that May 17, 1879, one Elizabeth A. Denniston was the owner in fee simple of lot 1, block B, Willow River, now a part of said city, except five feet off the south side thereof, which lot is situated on the west side of said street and extended to the center thereof, and upon which there was then situated, and for many years prior thereto, a warehouse used and occupied for the purpose of storing and handling grain and other farm products, and that said premises were chiefly valuable for such warehouse purposes; that May 17, 1879, the said Denniston, by an instrument in writing, granted to the said Hudson & River Falls Railway Company the right to construct, maintain, and operate its railroad in, upon, over, and through First street in said Hudson, in front of all of said lot except five feet off from the south side thereof, at any and all points in said street

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in front of said lot east of a line drawn parallel with, and twelve feet west of, the center line of said main track of the railway of said company, as the same was at that time constructed; that November 13, 1879, the said Denniston, by a warranty deed duly executed and acknowledged, sold and conveyed to the plaintiff all her right, title, and interest in and to said lot 1, described, and that the said plaintiff then became, and ever since has been, the owner in fee simple of said premises; that in 1881 the said plaintiff constructed an elevator in connection with said warehouse, and thoroughly prepared and fitted up the same for the business of handling grain to be shipped by railway to and from said warehouse, as well as by other means, and devoted nearly all of his entire time to said business, and that said business so conducted by him yielded him a net income of at least $1,500 per annum.

The complaint further alleges that in 1882 the said company consolidated into and became the defendant company, with other railroad companies, and that the defendant has since maintained and operated said line of road so built and constructed, but that the defendant never obtained or acquired any other or further or greater right to maintain its line of railroad over, through, or upon said First street or said lot 1, than those acquired from the Hudson & River Falls Railway Company as aforesaid; that in December, 1887, the defendant erected upon said First street, almost directly opposite to the plaintiff's said lot and warehouse, a passenger and freight station, consisting of one large building, and so located that the most westerly corner thereof extended nearly up to the east line of said street, so that the platform of said station house extended into said street a distance of nearly ten feet; that upon the erection of said station the defendant caused a track to be laid along the easterly side of said street, and convenient to said passenger and freight station, and the same has been regularly

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and continuously used and occupied by the defendant for the loading and unloading of passengers and freight, and as a part of the main track of the defendant, and has, ever since such erection and occupation of such station house, occupied the entire width of said street at the point opposite lot 1, and for a long distance both north and south of the same, for the purposes of its railroad business; that since the erection of said depot the defendant has used said street opposite said lot in such a manner as to entirely destroy the use of the same as a public highway, and to entirely prevent the use of the same for the purpose of teams or business of any sort along said street.

It is further alleged that directly south of said lot the defendant has maintained, during all of said time since the erection of said depot, and does now maintain, a high and steep embankment through and along the center of said street, many feet above the natural surface of the same, and along which its said tracks are laid; that no crossing is maintained over or passageway under said embankment of said railroad track at the intersection of the cross street south of the plaintiff's warehouse, and that by reason thereof it has been practically impossible for teams which have been driven to said warehouse to leave the same without being driven for a great distance along the side of said railroad tracks, and by a long and circuitous route back to the business portion of the city; that since the erection of said station the said track nearest to the plaintiff's warehouse has been used as a side track for switching purposes and for the storing of cars and for standing cars for the loading and unloading of freight and for the making up of trains, and has been so used that trains or parts of trains are being almost constantly pushed up and down said side track opposite said warehouse, and for a great portion of the time during each day cars have been left standing upon the track opposite the plaintiff's

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premises, at the first crossing north thereof, and which said crossing is the regular or usual way ordinarily used by residents of Hudson and vicinity of reaching plaintiff's premises, and the only practicable route of reaching the same; that, by reason of such obstructions aforesaid, the approaches to said warehouse are, and during all the time since the erection of said station house have been, for many hours each day, totally obstructed, and egress from and ingress to said warehouse by teams, or business of any sort, entirely prevented; that by reason of such use of said side track, and the noise, commotion, and annoyance attendant upon the use of said premises for switching and yard purposes, it is practically impossible to drive teams up to or near said warehouse, without their becoming greatly frightened and excited, and in much danger of becoming uncontrollable, running away, and destroying themselves and other property; that, by reason of the neglect and failure of the defendant to put proper planking between and along said tracks opposite said warehouse, it is impossible for teams and wagons to turn around on said premises, even when said tracks are not obstructed by cars.

The complaint alleges, further, that the use and occupation of said First street and said lot 1 by the defendant in the manner aforesaid, and for any other purpose than the running of its regular trains over and upon the same, was and is wrongful, unlawful, and without permission or authority from the plaintiff or his grantor, and without permission or authority from the city of Hudson; that, by reason of said unlawful and wrongful use and occupation of said First street opposite lot 1, the business of the plaintiff at said warehouse fell off and declined, and soon thereafter was totally destroyed; that by reason thereof the plaintiff was unable to attract or procure any business at said warehouse, and was finally compelled to abandon the said business and said premises for warehouse and elevator

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purposes; that the buildings on said lot 1 are of very little value, except for warehouse and elevator purposes; and that because of said wrongful use of said First street the rental value of the same has been totally destroyed, and the premises have been rendered almost entirely valueless for any purpose whatever. Wherefore plaintiff claimed $3,000 damages.

From an order overruling a general demurrer to such complaint the defendant appeals.

Solon L. Perrin, for the appellant, contended, *inter alia*, that if, because of the occupancy of the street, carefully and properly or otherwise, by defendant, plaintiff has been embarrassed or inconvenienced, his embarrassment or inconvenience are the same in kind — though perhaps greater in degree — as that suffered by the public and all others living upon and using the street. *Blood v. N. & L. R. Corp.* 2 Gray, 137; *Heiss v. M. & L. W. R. Co.* 69 Wis. 555; *Hanlin v. C. & N. W. R. Co.* 61 id. 515; *Harvard College v. Stearns*, 15 Gray, 1; *Barnum v. M. T. R. Co.* 33 Minn. 365, and cases cited; *Shero v. Carey*, 35 id. 424; *Swanson v. M. & R. R. Boom Co.* 42 id. 535; *Lakkie v. C., St. P., M. & O. R. Co.* 44 id. 438; *Trustees v. M. & L. W. R. Co.* 77 Wis. 158; *Sinnott v. C. & N. W. R. Co.* 81 id. 95, 103. The deed of the common grantor was a conveyance of and release from any and all damage to the property by any railroad use of the street, and plaintiff is estopped thereby from maintaining this action.

For the respondent there was a brief by *Ray S. Reid* and *Baker & Helms*, and oral argument by *Mr. Reid.*

CASSODAY, J. It sufficiently appears from the foregoing statement that since the construction of the depot mentioned the defendant had used the street opposite the plaintiff's lot in such a manner as to completely obstruct all travel with teams thereon, and to entirely destroy the

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use of the same as a public highway, and thereby prevented the plaintiff's former customers, and other persons who would otherwise have done business with him at his warehouse and elevator, from having access to or egress from the same, and that by such action the defendant has destroyed the plaintiff's business and rendered his premises of but very little value. If such obstruction was wrongful, unlawful, and without permission or authority from the plaintiff or his grantor or the city of Hudson, as alleged, then it certainly constituted a public nuisance, and subject to be abated as such. Elliott, Roads & S. 477 *et seq.* But, to entitle a private party to maintain an action for such public nuisance at common law, it must appear that he has suffered some special or peculiar damage, differing, not merely in degree, but in kind, from that which is deemed common to all. *Carpenter v. Mann*, 17 Wis. 155; *Zettel v. West Bend*, 79 Wis. 316; *Hay v. Weber*, 79 Wis. 591. But here the complaint alleges such special and peculiar damage, and hence states a good cause of action at common law. *Walker v. Shepardson*, 2 Wis. 384; *Enos v. Hamilton*, 27 Wis. 256; *Pettibone v. Hamilton*, 40 Wis. 402; *Burrows v. Pixley*, 1 Root, 362, 1 Am. Dec. 56; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Iveson v. Moore*, 1 Ld. Raym. 486; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281; *Goldthorpe v. Hardman*, 13 Mees. & W. 377; 16 Am. & Eng. Ency. of Law, 971 *et seq.* Such right of action at common law has not been taken away by the English statutes. *Beckett v. Midland R. Co.* L. R. 3 C. P. 82; *McCarthy v. Metropolitan Board*, L. R. 8 C. P. 191, affirmed L. R. 7 H. L. 243; *Fritz v. Hobson*, 14 Ch. Div. 542; *Truman v. L., B. & S. C. R. Co.* 29 Ch. Div. 89; *Caledonian R. Co. v. Walker's Trustees*, 7 App. Cas. 259; *Rapier v. London T. Co.* [1893] 2 Ch. 588. Some of these cases are quite analogous to the case at bar. Thus in *Fritz v. Hobson*, 14 Ch. Div. 542, it was expressly held that, "when the private

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right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable use of the highway, he is entitled to recover damages from the wrongdoer, in respect of loss of custom in the business which he carries on in his house." Our statute is confirmatory of the common law, and declares, in effect, that the circuit courts shall have jurisdiction of actions to recover damages for and to abate a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same. R. S. sec. 3180.

According to the complaint, the defendant has had no authority, as against the plaintiff, to obstruct the street in front of his premises, except under and by virtue of the instrument in writing whereby there was granted to the defendant's predecessor "the right to construct, maintain, and operate its railroad" in the street, "in front of said lot, . . . *as the same was at the date of said instrument constructed.*" Of course, this grant gave to the defendant's predecessor, and so to the defendant, all the rights which are thereby necessarily implied. But manifestly it gave to neither the right to destroy the street as a public highway in front of the plaintiff's lot. The statutes only authorized such construction and maintenance of such railroad in the street on condition that the company should restore the highway "to its former state, or to such condition as that its usefulness" should "not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by such railroad." R. S. sec. 1828, subd. 5, and sec. 1836. It has repeatedly been held that such duty is enforceable by the courts. *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534; *State ex rel. Grady v. C., M. & N. R. Co.* 79 Wis. 259. Thus, it appears that the obstruction and inter-

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ference with the street complained of, were not authorized by statute. The case, therefore, is clearly distinguishable from that class of cases where the incidental injury complained of is the necessary result of an authorized taking of land and the proper and authorized use of the same.

"A railroad company cannot monopolize a street, in derogation of the public and private use to which it has been applied." *Janesville v. M. & M. R. Co.* 7 Wis. 484. In *Farrand v. C. & N. W. R. Co.* 21 Wis. 439, DIXON, C. J., said: "The company has no right to appropriate the whole or any part of the street to its own exclusive use, as for side tracks, switches, engine houses, depot buildings, and the like, and so destroy the public right of way." In *Penn. R. Co. v. Angel*, 41 N. J. Eq. 316, it was held that "a railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way, is responsible for any nuisance, public or private, thereby created." The same rule was applied in the same state, where, as here, the railway company acquired the right to lay its track in a public street by grant. *Thompson v. Penn. R. Co.* 45 N. J. Eq. 870. In *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 329, Mr. Justice FIELD, speaking for the court, said: "The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. . . . Plainly, the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. . . . For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous courts of equity will interfere and restrain the nuisance." *S. C.* 137 U. S. 568. See, also, *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432. In *Truman v. L., B. & S. C. R. Co.* 29 Ch. Div. 89, the

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railway company, under the authority of an act of Parliament, purchased a piece of land adjoining one of its stations, and used it as a cattle dock; and yet it was held that the act gave the company no authority to create a nuisance to occupiers of houses near the cattle dock by herding cattle therein. So, in *Rapier v. London T. Co.* [1893] 2 Ch. 588, it was "held that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

The obstruction of the passage to and egress from the warehouse and elevator in question by means of a permanent embankment, the storing of cars, and other mere depot uses, is not only in contravention of the express terms of the grant, but also of the mandate of the statute cited. Upon authority and reason, we must hold that the complaint states a good cause of action.

By the Court.— The order of the circuit court is affirmed.

BOURGEOIS, Respondent, vs. NORTHWESTERN NATIONAL INSURANCE COMPANY, Appellant.

December 1 — December 29, 1893.

Insurance against fire: Standard policy: Waiver of conditions.

Ch. 195, Laws of 1891, provides for a "Wisconsin Standard Policy," to which all fire insurance policies issued in this state shall conform, and that other conditions may be written upon or attached to a policy, but that they "shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy." *Held*, that since the enactment of this law a local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive the provision of the standard policy prohibiting future additional insurance.

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APPEAL from the Circuit Court for *Fond du Lac* County.

Action upon an insurance policy of $2,000 upon plaintiff's dwelling house and furniture therein. The policy was issued December 16, 1891, upon an application dated December 14, 1891, and was what is known as the "Wisconsin Standard Policy," prepared by the state insurance commissioner under ch. 195, Laws of 1891. It contained the following condition: "*This* entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

In January, 1892, the insured effected $2,000 additional insurance upon the same property in another company. The insured property was totally destroyed by fire, February 8, 1892. Upon the trial a special verdict was had, and the jury found in response to an appropriate question that the defendant's local agent was informed, at the time the application for the insurance in question was made, that the plaintiff would take out $2,000 additional insurance upon the house, and that he consented thereto. This consent was by parol, and was the only consent proven or relied on by the plaintiff. The defendant appeals from judgment for the plaintiff on the verdict.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

Maurice McKenna, for the respondent.

WINSLOW, J. Although other questions are presented by the record, the single question indicated in the foregoing statement of facts is all that we find it necessary to consider. That question is whether the local agent, at the time the application for insurance is made, may effectually waive by parol the clause prohibiting future additional in-

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surance, the policy containing such clause being afterwards accepted and held by the insured.

There are numerous cases in this court holding that the local agent has implied authority, while making the contract of insurance, to waive stipulations or conditions inconsistent with facts then existing; at least, that he had such power prior to the passage of ch. 195, Laws of 1891. It has also been intimated that such a waiver might be made as to conditions prohibiting future acts or defaults. *Schomer v. Hekla Ins. Co.* 50 Wis. 575, 580; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 5. One serious objection to holding such an attempted waiver effectual as to future conduct is well stated in the opinion in the *Schomer Case*, as follows: "Where the policy itself, as in the case before us, only permits other insurance to a given amount, all negotiations of the parties upon that subject must be deemed to be merged in the written contract." However, the question whether such a waiver of conditions as to future conduct could be effectual was not presented either in the *Schomer Case* or in the *Hankins Case*, and cannot therefore be said to have been decided. It may be said, and with some force, that in the case of *Stanhilber v. Mutual M. Ins. Co.* 76 Wis. 292, a waiver by the local agent of a condition as to future conduct was held effectual, but there were other facts present in that case, and we do not regard it as an adjudication in the affirmative of the proposition now before us. The question, therefore, must be considered as still open. In the absence of legislative action on the subject, it would certainly be a most interesting question, and one not free from doubt. The objection to an affirmative answer, suggested in the *Schomer Case*, is certainly a cogent one. *Phœnix Ins. Co. v. Maxson*, 42 Ill. App. 164.

However, there has been legislative action which, in our judgment, has an important bearing on the question, and

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which must be considered. In 1891 an act was passed by our legislature providing for an uniform policy of insurance to be used in this state, known as the "Standard Insurance Policy." Ch. 195, Laws of 1891. This act went into effect September 1, 1891. The policy in suit here was the standard policy provided for by that act, was issued December 16, 1891, and consequently must be governed by the provisions of that act. The act itself provides substantially as follows: (1) That the insurance commissioner shall prepare, with the assistance of the attorney general, a printed form in blank of a policy of insurance to be known as the "Wisconsin Standard Policy," and send a copy to each company doing a fire insurance business in this state. (2) That after September 1, 1891, no insurance company shall issue any form of policy on property in this state except such as conforms in all particulars to the standard policy, and no other conditions or agreements shall be indorsed thereon or made part thereof, except (a) the name of the company, location, amount of stock, and sundry other matters not necessary to be here stated; (b) "printed or written forms of description and specification or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with *or a waiver of any of the provisions or conditions of the standard policy* herein provided for) may be written upon or attached or appended to any policy on property in this state." It is unnecessary to state here any further provisions of the act.

This act is broad and sweeping in its terms and scope. It aims to bring order out of chaos. Prior to its passage there were as many different contracts of insurance as there were companies. The variations and differences between the conditions of the policies issued by the various insurance companies were almost infinite in number; new clauses

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and conditions were being constantly inserted, generally ingeniously worded and obscurely printed; and, singularly enough, these new conditions were always in the interest of the insurer, and not of the insured. To meet this condition, the act under consideration was passed. That it is a long step in the right direction cannot be doubted. Under it there can be practically but one form of policy. When a man contracts for insurance, he knows that he is contracting for a standard policy and for nothing else, and he knows that he will get that and nothing else. As the law becomes better known, and the terms of the standard policy better understood, it is manifest that it will be more valuable to the business world.

Thus much as to the purpose and probable effects of this law is apparent to the most superficial observer. More critical examination reveals the undoubted fact that the law was not passed solely for the protection of the insured. It provides, in clear and distinct terms, that other conditions may be printed or written upon or attached to the policy, but that they shall *not be inconsistent with nor a waiver of any of the provisions or conditions of the standard policy.* In thus providing that other conditions may be incorporated in the policy by writing or printing, other methods are plainly excluded under familiar legal principles. The intent plainly was and is that, so far as the conditions and provisions of the standard policy go, they shall govern, and that they shall not be omitted, changed, or waived in any manner. Other provisions not conflicting with them may be added in writing or printing, but the conditions of the standard policy itself must remain unimpaired.

The condition here broken was one of the conditions of the standard policy. It is claimed that it was waived, not in printing or writing, but by mere word of mouth. Can this be successfully maintained? If so, then this part of

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the law is at once emasculated. If this be so, then the agent may do by the merest casual word of mouth that which neither he nor the company could do by the most formal written stipulations under seal. Such a result cannot be tolerated. The law could be scarcely more explicit in its terms than it is. To our minds, it is clear that, since the enactment of this law at least, the local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive that provision of the standard policy prohibiting future additional insurance. We are not to be understood as deciding anything further in this case. This is the sole point involved in the decision, and consequently the sole point decided.

The law in question is substantially a copy of chapter 488 of the laws of the state of New York for the year 1886. We are referred to the case of *Quinlan v. Providence W. Ins. Co.* 133 N. Y. 356, decided in 1892, where the court of appeals discuss the effect of that law, and say: "Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract *after the policy has been issued*, or to waive conditions or forfeitures." This may well be so. Such a doctrine does not in the least militate against the position taken in the present case, and, as no such question is presented here, we express no opinion upon it.

By the Court.—Judgment reversed, and cause remanded for a new trial.

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THE GARDEN CITY BANKING & TRUST COMPANY, Appellant, vs. GEILFUSS, Assignee, Respondent.

ASCHERMANN (MILWAUKEE COUNTY, Respondent) vs. COMMERCIAL BANK OF MILWAUKEE (GEILFUSS, Receiver, Appellant).

December 1 — December 29, 1893.

Voluntary assignment: Banking corporation: Subsequent appointment of receiver: Distribution of proceeds.

1. A banking corporation, created and existing under the general banking law of this state, may make a valid assignment of all its property for the benefit of its creditors.
2. Where a banking corporation has made a valid assignment of all its property for the benefit of creditors, such property cannot be sequestered and a receiver thereof appointed, under secs. 3216, 3217, S. & B. Ann. Stats., so as to supersede the assignment and change the rule for the distribution of the proceeds of the property among creditors.

APPEALS from the Circuit Court for *Milwaukee* County.

The orders appealed from in these cases relate substantially to the same subject matter. The Commercial Bank of Milwaukee, organized under the general banking law of the state, and having its office and place of business at Milwaukee, Wis., on the 21st day of July, 1893, made an assignment to *A. B. Geilfuss*, pursuant to the statute in such case made and provided, for the benefit of all its creditors, its liabilities, exclusive of interest, being about $1,183,999.37, and its assets about $1,480,220.68; and as such assignee he took possession of said assets and proceeded in the execution of his trust. The bank was indebted at the time to *Milwaukee County* in the sum of $317,484.33, but no claim therefor has as yet been filed in the matter of said assignment.

On the 5th of August, 1893, Edward Aschermann recovered a judgment against the bank in the circuit court for

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Milwaukee County for $436.67, and execution was issued thereon to the sheriff of Milwaukee county, and thereafter returned wholly unsatisfied. On the 8th day of August, 1893, said Edward Aschermann duly filed in the circuit court, against said corporation, a petition under sec. 3216, S. & B. Ann. Stats., praying that the court might sequestrate the stock, property, things in action, and effects of such corporation, and appoint a receiver thereof, with a view to winding up and settling its affairs. An order was made by the circuit court thereon, sequestrating the stock, property, effects, and things in action of said Commercial Bank, and appointing *A. B. Geilfuss* receiver of the same, who at once qualified as required by law. *Milwaukee County* filed in said suit its claim against said bank, and by its petition alleged that said *Geilfuss*, as such receiver, had cash on hand in the sum of $125,000, and prayed that the county be declared a preferred creditor of said bank under sec. 3245, S. & B. Ann. Stats., and be first paid by said receiver accordingly.

On the 29th of September, 1893, *Geilfuss*, as assignee, filed in the circuit court his account and report in the matter of the said assignment, substantially as required by sec. 1701, S. & B. Ann. Stats., but alleged that no dividend had been paid, and that the report was made for the purpose of having it determined whether the estate was to be administered by him as receiver and distributed that way, or as assignee, and set forth the proceedings which had resulted in his appointment as receiver in the case of Aschermann against the Commercial Bank. He asked that a final settlement of the account be had upon notice, and that he be discharged as such assignee. Said matter came on to be heard before the court upon notice, and the appellants, the *Garden City Banking & Trust Company*, the *Wauwatosa Stone Company*, *Story Bros.*, and *Alice C. Boorse* and others, creditors of said bank, objected thereto that the as-

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signee had not administered his trust, and that his subsequent appointment as receiver furnished no ground for his discharge. The court confirmed the report and account of the assignee, and, finding his petition true and that he had been appointed receiver as stated, held that his said appointment superseded the prior assignment, although it was otherwise a valid assignment, and on October 31, 1893, ordered that said *A. B. Geilfuss*, as assignee, be discharged from all further duty or liability as such, and that all the assets which he then held as assignee be turned over, accounted for, and held by him as receiver, and that from that time forth he should hold and administer the assets and property of said Commercial Bank as receiver, and not as assignee. The *Garden City Banking & Trust Company*, the *Wauwatosa Stone Company*, *Story Bros.*, and *Alice C. Boorse* appealed therefrom.

The petition of *A. B. Geilfuss*, as receiver in the case of Aschermann against the bank, came on to be heard, and the previous assignment of the bank to said *Geilfuss*, and the proceedings that had been had thereon, were set up in opposition; and he prayed that the question whether he had any funds in his hands as such receiver should be first determined upon notice to parties interested, and that in that case the question of the priority of the claim of the county be determined before any dividend should be paid. The court found the claim of the county to be as above stated, and that *Geilfuss*, as receiver, held the stock, property, things in action, and effects of the bank, and had on hand thereof, in cash, the amount of $150,000 or more; and made an order, dated November 1, 1893, that the county of *Milwaukee* be adjudged and declared to be a preferred creditor of said defendant corporation, and that said receiver pay said county, out of the funds then in his hands, the sum of $50,000 on account of said preferred claim, within three days after the service of the order.

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Upon leave given, *Geilfuss*, as receiver, appealed from said order.

For the appellant *The Garden City Banking & Trust Company* there was a brief by *Van Dyke & Van Dyke*, and oral argument by *G. D. Van Dyke*. They argued that a valid assignment made by a corporation of this state is not superseded by the subsequent appointment of a receiver under sec. 3216, R. S. That a corporation may make an assignment, see Burrill, Ass. (5th ed.), sec. 64; *Powers v. C. H. Hamilton Paper Co.* 60 Wis. 23; *Conlee L. Co. v. Ripon L. Co.* 66 id. 481; *T. T. Haydock Carriage Co. v. Pier*, 74 id. 582. Nothing in ch. 80, R. S., nor in secs. 3216 *et seq.*, denies or is inconsistent with that right. On the contrary it seems to be expressly saved by sec. 3250, which provides that nothing in that chapter "shall be deemed to repeal any other remedies given by these statutes to or against corporations," etc. Conceding that a corporation had, independent of statute, the right to make an assignment, still the exercise of that right has been so regulated by statutes as virtually to make it the exercise of a new statutory right. The statute, differing from the common law, places the property *in custodia legis*, and the assignee is treated as an officer of the court. R. S. sec. 1693; *Hamilton-Brown S. Co. v. Mercer*, 84 Iowa, 537; 1 Am. & Eng. Ency. of Law, 872 and note; *Littlejohn v. Turner*, 73 Wis. 113, 123; *Hamilton-Brown S. Co. v. Adams*, 5 Wash. 333; *Hyde v. Weitzner*, 45 Minn. 35. Since the decision in *Powers v. C. H. Hamilton Paper Co.* 60 Wis. 23, 28, the statutes have conferred upon the assignee the powers then lacking, and he now has all the powers possessed by a receiver. Independently of any saving clause in the statute, the appointment of a receiver should not supersede an assignee who is virtually a receiver himself. Secs. 3216 *et seq.* were taken from ch. 114, R. S. 1849, and were there taken *verbatim* from ch. 118, R. S. of Mich. 1846. In the

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Michigan Revision of 1846 these provisions are a compilation of session laws of 1837 and 1839, which were construed in *Town v. Bank of River Raisin*, 2 Doug. (Mich.), 530. See, also, *Covert v. Rogers*, 38 Mich. 363–5; *Bank of Montreal v. Potts S. & L. Co.* 90 id. 345. A general assignment vests the title to the whole of the property in the assignee. 1 Am. & Eng. Ency. of Law, 852. And the subsequent appointment of the receiver does not *ipso facto* divest such title, even when the assignment is fraudulent. *Glenny v. Langdon*, 98 U. S. 20; *Olney v. Tanner*, 10 Fed. Rep. 101.

C. A. Koeffler, Jr., for the appellants *Wauwatosa Stone Company*, *Story Bros.*, and *Alice C. Boorse.*

For the respondent *Geilfuss*, as assignee, there was a brief by *W. H. Timlin*, and oral argument by *Mr. Timlin*, *Leopold Hammel*, and *J. G. Flanders.*

W. H. Timlin, for the appellant *Geilfuss*, as receiver.

Leopold Hammel, District Attorney, and *James G. Flanders*, of counsel, for the respondent *Milwaukee County.*

PINNEY, J. 1. The right of a banking corporation, created and existing under the general banking law of the state, to make a valid assignment of all its property and assets for the payment of its debts in the manner and form and to the effect prescribed by the statute, was very properly conceded by counsel who argued in support of the orders appealed from. Like trading, manufacturing, and other business corporations, the Commercial Bank had an absolute right of disposition of its property and assets, as full and ample as a natural person, unless restrained, expressly or by implication, by the general banking law or some other statute of the state. We have not been referred to, and do not know of, any limitation on the powers of banking or other corporations in this respect; and as the right of private corporations in general to make such assignments has been so universally recognized and supported in this

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and other states, in view of the great increase of such corporations of late and the great proportion of the business of the country conducted by them, the question of the right of a banking or other private corporation to make such an assignment, if not expressly or impliedly forbidden by its charter or other positive law, must be regarded as clear and undoubted as that of a natural person. The duty of a banking or other corporation to devote all of its property to the payment of its debts stands upon the same ground and does not differ from that of a natural person, and, in the absence of any restriction, is one of the implied powers of the corporation.

2. It is not contended that the assignment in question is subject to any legal infirmity or taint of fraud, but the entire controversy grows out of the claim that the proceedings instituted in the case of Aschermann against the bank, several days after the assignment was perfected, in which the stock, property, things in action, and effects of the bank were sequestered, as it is claimed, and *Geilfuss* (already the assignee of the bank under its assignment) was appointed receiver of the same, operated to supersede and vacate the assignment and impose upon the property and assets of the bank a different rule of distribution from the one prescribed by the assignment, so as to entitle *Milwaukee County* to a preference of payment under the statute (S. & B. Ann. Stats. secs. 3217, 3245) relating to proceedings against corporations.

By the statute (S. & B. Ann. Stats. sec. 1693*a*) it is provided that all preferences in assignments for the benefit of one creditor over another, "except for the wages of laborers, servants and employees earned within six months prior thereto, shall be void;" and, by sec. 1693*c*, that "the claims of all servants, clerks, or laborers for personal service or wages owing from the assignor for services or labor performed for the three months preceding such assignment,

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shall be preferred over the claims of all other creditors, and shall be paid first by the assignee, after the payment of costs, *debts* due the United States or the state of Wisconsin, all *taxes* and assessments levied and unpaid, expenses of the assignment and executing the trust." It is plain that, had the instrument of assignment directed a preference of payment of the debt of the bank to *Milwaukee County* over its general creditors, the assignment would have been absolutely void, and it is very certain that in the absence of such provision any such preference of payment allowed by the assignee would be a palpable abuse of his trust and a conversion of trust funds for which his bondsmen would be liable. Considerations of public policy and the inconvenience which may flow from this conclusion cannot be allowed to prevail against the plain and positive language of the statute. We cannot look elsewhere for a declaration of the public policy of the state; and the language of the statute, allowing preferences in certain cases only, has a negative force and denies them in all others. If, however, the proceeds of the property and assets so assigned are to be administered and distributed by the receiver under the authority of the court in the action of Aschermann against the bank, it is claimed that a preference of payment is prescribed by secs. 3217 and 3245, already referred to, over all other claims, "for the payment of *taxes* and *debts* due to the United States and the state of Wisconsin, and any county, city, town, or village therein."

It is a matter of no importance to the decision that the circuit court having jurisdiction of the proceedings in the voluntary assignment also appointed the receiver, nor that the assignee is the same person afterwards so appointed. The controversy in these cases resolves itself into the single question whether the proceedings in the case of Aschermann against the bank superseded or vacated the prior assignment, or furnished any ground for an adjudication to

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that effect. It must be conceded, we think, that the assignment by the bank vested the stock, property, things in action, and effects of the bank in *Geilfuss*, as assignee, in trust for all its creditors, and that they thereby acquired in a perfectly lawful and proper manner, and upon a valid consideration, a vested right to have the same converted into money and applied *pari passu* to the payment of their respective debts. Their rights were as clearly and as certainly fixed in this respect, beyond the power of the assignor or any one else to recall or revoke them, as if they had been secured to them by a valid mortgage of the property regularly executed. Courts of law would recognize the legal title of the assignee, and protect him in his legal ownership of the property assigned; and elaborate provisions exist for the execution of the trusts of the assignment under the supervising direction and authority of the circuit court. All actions for the recovery of the assigned estate or any interest therein, or for the recovery of property conveyed or transferred in fraud of creditors, or the transfer or conveyance of which is void by reason of being preferential or otherwise, are required to be brought only in the name of the assignee. S. & B. Ann. Stats. sec. 1693*b*; *Valley Lumber Co. v. Hogan*, 85 Wis. 366. If necessary, the court could remove a delinquent assignee and appoint another. S. & B. Ann. Stats. sec. 1702. In brief, elaborate and efficient provisions exist for the conversion of all the estate assigned into money, and a fair and legal application of it to the payment of the debts of the bank. No occasion whatever is shown to have existed for the interference of a court of equity to protect the rights and interests of those interested in the trusts of the assignment, or any reason why they should not be fully executed, unless the sequestration of the property of the bank and appointment of a receiver in the case of Aschermann against the bank have the extraordinary effect ascribed to them, and wholly destroy, or

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furnish ground for subverting, the trusts of an assignment free from any taint of fraud or imputation of illegality.

3. The statute (S. & B. Ann. Stats. secs. 3216, 3217) under which the proceeding in the case of Aschermann against the bank was instituted is purely remedial, and gives no countenance to the idea that prior lawfully existing rights are to be displaced or in any manner disturbed by it; nor is there any authority, so far as we are advised, for holding that such a proceeding is designed to have any retroactive effect; nor is it either necessary or just that it should have such effect. It is quite sufficient, for all purposes of justice, that the remedy should be as broad, comprehensive, and complete as upon a creditors' bill or in a bankruptcy proceeding. The title of a receiver or assignee under such proceedings has no retroactive effect to disturb prior existing rights, unless they are in fraud of creditors or in contravention of some express statute. It is provided, in substance, that after judgment against a corporation and execution thereon returned unsatisfied in whole or in part, upon petition or action brought, the circuit court within the proper county "may sequestrate the stock, property, things in action, and effects of such corporation, and appoint a receiver of the same;" that is to say, the court may take and set aside the property of the corporation from its custody or possession, or from the possession of any contending parties, and take possession of it, in order to enforce obedience to the final judgment or to preserve it during the time the proceeding is pending, and the court may appoint a receiver of the same. The same general rules apply to a sequestrator as to a receiver. In the final order in any such action, "the court shall direct a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among the fair and honest creditors of such corporation in proportion to their debts respectively, who shall be paid in the order prescribed in section 3245," which

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provides for preferences other and different from those allowed in voluntary assignments.

Now, the property and assets of the corporation, as we have seen, had wholly passed to and become vested in *Geilfuss* as assignee. The corporation had no property which could go to sequestrators or a receiver under such a proceeding, and it was not the intention of the statute that the court should sequestrate in this proceeding, and appoint a receiver for, property which the corporation had lawfully and honestly conveyed to other parties for entirely proper and legitimate purposes. The ends of justice require no such extraordinary or unusual construction of this statute. The statute contemplates and requires only that an administration of the property and of the affairs of the corporation shall be had, and that all *its* property and effects which it had and owned at the time of the commencement of the proceedings shall go into the hands of the receiver when appointed, and be converted and applied to the payment of its fair and honest creditors in the order specified. The title which a receiver takes under a proceeding of the kind in question is very fully, and, as we think, completely, defined in the case of *Powers v. C. H. Hamilton Paper Co.* 60 Wis. 28, in which it is held that the powers of such receiver "are far more extensive than those of an assignee in a voluntary assignment" as they then existed, and he had "the powers, and performed the functions, of a receiver in a creditors' suit proper, or on proceedings supplementary to execution;" and that he may, "under the direction of the court, maintain an action against any person holding any property of the defendant corporation in secret trust for it, or to recover any property which has been conveyed by it in fraud of its creditors." It is very true that in such a proceeding the court may lawfully assert, through its receiver, authority and control over all property of the corporation, and restrain all other actions or proceedings con-

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cerning the same; yet the ultimate relief to be granted in favor of creditors is simply the conversion of *the property of the corporation* into money, and its appropriation to the payment of its debts in the manner specified in the statute. It is laid down, as a general principle applicable to receivers, that "the appointment of a receiver does not operate to divest liens previously acquired on the property of the debtor by other creditors acting in good faith, but it is regarded as having been made subject to such rights and liens as may have been previously acquired by other judgment creditors, who will not be divested of their liens by virtue of the subsequent receivership; . . and, in general, it may be said that a receiver over a debtor's property occupies the same relation towards the proceeds or fund derived from it as the debtor himself." The receiver can obtain no other or greater rights, save in the case of property fraudulently transferred or conveyed (High, Rec. § 440, and cases cited); and when a receiver has been appointed under this statute the title to all the property of the corporation vests in him as trustee for the benefit of creditors and stockholders. He holds the property of the corporation for the benefit of all the parties interested in it. Beach, Priv. Corp. §§ 772, 786. The appointment of a receiver has been said to be an equitable execution. The receiver is virtually a representative of the court and of all the parties in interest in the litigation wherein he is appointed. Tayl. Priv. Corp. § 542; *Davis v. Gray*, 16 Wall. 203, 218. Manifestly this equitable execution cannot go, in a proceeding such as this, against property the corporation did not own at the time it was instituted. He has no power to set aside legal and valid acts of the debtor, but such as are illegal and forbidden by law he can successfully assail. Edw. Rec. 365; 2 Story, Eq. Jur. § 829. In *Wiswall v. Sampson*, 14 How. 64, it is laid down that a receiver will be appointed against a party having possession under

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legal title, if the court is satisfied that such party has wrongfully obtained that interest in the property; thus, where fraud can be proved, and immediate danger is likely to result if possession pending the litigation should not be taken by the court in the mean time. The effect of the appointment in such a case is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the receiver will be considered his receiver, and the master will be usually directed to inquire what incumbrances there are affecting the estate, and into the priorities, respectively; but, without some equitable showing, no receiver can be appointed against the legal title, and certainly none where, as in this case, it is admitted that it was honestly and legally acquired.

It follows from these views that upon the conceded facts the property, assets, and effects assigned to *Geilfuss*, as assignee for the benefit of the creditors of the bank, could not by any possibility be sequestered in the *Aschermann Case*, or the receivership in it extended over the same. The assignee was the owner of this property by title not subject to any infirmity or condition subsequent, and when the receiver was appointed in the *Aschermann Case*, so far as we are advised, the corporation had no stock, property, things in action, or effects whatever. All its property, by the assignment, had lawfully passed to a third party; and, although it continued to exist as a corporation, it is scarcely to be presumed, and it is not claimed in fact, that it had acquired new capital or property with which to conduct or carry on any business within the few days that intervened between the date of the assignment and the appointment of the receiver.

The case of *Ballin v. Loeb*, 78 Wis. 404, was relied on to show that the proceedings in the *Aschermann Case* operated

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to supersede and vacate the assignment, and that therefore the proceeds of the property of the bank should be distributed according to sec. 3245. Although in the opinion in that case there is some general language commending a fair and equal distribution, and denouncing as more selfish than just that kind of diligence by which one creditor of an insolvent corporation secures to himself a prior right to its property and an unequal advantage over the other creditors, yet it will be found, upon a careful examination of the case, that it does not support the contention for which it is cited. After very properly maintaining the right of the court to enjoin all other creditors from pursuing remedies, and holding that officers of the corporation may be compelled to deliver to the receiver all property of the corporation held by them on attachment or execution, the real point and effect of the decision is thus stated: "It [the property of the corporation] is all sequestered, and all of it must go into the hands of the receiver, to be disposed of by him alone as officer of the court, and all persons having any of the property must be ordered to deliver it to him. All proceedings by any other creditors, in any other way, or in any other court, must be restrained; and, if a sheriff or other officer have any of the property in his hands under such proceedings, it must be delivered to the receiver; *and all such other creditors must come into this action for any share of the property, or for any remedy, else this proceeding would be ineffectual.*" So, it is there held that the liens and rights of other creditors lawfully acquired against the property of the corporation will follow it into the hands of the receiver, and be recognized and enforced in the usual method upon an intervening petition. The liens and rights of such parties, if valid, attach to the fund in the hands of the receiver, and it will be administered accordingly. *Walling v. Miller*, 108 N. Y. 173, 177. To the same effect is *Wiswall v. Sampson*, 14 How. 66, 67, where it is held that "the

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property is a fund in court to abide the event of the litigation. . . . It is true, in administering the fund, the court will take care that the rights of prior liens or incumbrances shall not be destroyed, and will adopt the proper measures, by reference to the master or otherwise, to ascertain them and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?" And the same rule has been recently applied in the case of *Ellis v. Vernon Water Co.* 23 S. W. Rep. 858, 862, where it is said: "The receivership does not destroy any liens that may have been acquired before the appointment, but the remedy for their enforcement should be sought in the court in which the whole estate is being administered." This, in substance, is the rule announced in *Ballin v. Loeb*, 78 Wis. 404, and shows that the liens against the property in such a case are not vacated; and, as to the assignment in question in *Ballin v. Loeb*, it appeared that it was collusive and the result of a conspiracy with the corporation and its directors to obtain an unjust preference over other creditors, and was therefore fraudulent and void. *Ballin v. Loeb* does not justify the conclusion that the assignment of the bank to *Geilfuss* was vacated or affected in the slightest manner by the subsequent proceedings in the *Aschermann Case*, and wholly fails to show that the receiver in that case, as such, has any authority whatever to interfere with the property assigned or its proceeds. Any other rule would be productive of wrong and injustice, and introduce into the administration of estates assigned by corporations for the benefit of their creditors great embarrassment and uncertainty.

It follows, from these views, that the order of the circuit court appealed from by the *Garden City Banking & Trust Company* and others in the matter of the assignment of the

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Commercial Bank of Milwaukee must be reversed, and the cause remanded to the circuit court, with directions that the assignee proceed in his capacity as such, and not as receiver, to administer the assets and property of said Commercial Bank according to law, notwithstanding his appointment as such receiver, and that this cause be remanded for further proceedings according to law.

It is manifest that the receiver, *Geilfuss*, did not, as such, have the possession and control of the stock, property, things in action, and effects of the Commercial Bank of Milwaukee theretofore assigned to him as assignee, and had not on hand any money whatever that should be ordered to be paid over in the case of Aschermann against the bank. Whether the claim of *Milwaukee County* against the bank is a preferred one, under sec. 3245, is not determined, as at present it does not appear that there is or will be any fund to distribute under that section, and as yet the question is an abstract and not a practical one. Should occasion require, this claim may be renewed. The order that *Geilfuss*, as receiver in that case, pay to *Milwaukee County* the sum of $50,000 on account of its alleged preferred claim, is erroneous and must be reversed, and the cause remanded for further proceedings according to law.

By the Court.— Judgment in these cases is ordered accordingly.

MURPHY and others, Plaintiffs in error, vs. THE STATE, Defendant in error.

December 1 — December 29, 1893.

Burglary by tramps: Criminal conspiracy: Evidence: Instructions.

1. In a criminal case, the court having repeatedly charged the jury that, to justify a conviction, "no mere weight of evidence is sufficient unless it excludes all reasonable doubt," and that "the proof

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of guilt must be inconsistent with any other rational supposition," it was not error to refuse to give an instruction to the effect that the defendants should not be convicted upon mere suspicion, especially as there was abundant undisputed evidence in the case tending to prove the guilt of all the defendants.

2. Defendants were vagrants and tramps, punishable under secs. 1543–1546, R. S., and sec. 1547*d*, S. & B. Ann. Stats., and had confederated together to continue their criminal career as such. Acting together as confederates they attempted to steal passage on a railway train, and refused to pay fare thereon. After being ejected from the train they continued together until late at night, when, being substantially together and acting in concert, three of them stole some chickens. An hour or two later a store about eighty rods distant was burglarized. After the store was robbed they remained substantially together, wandering through the country, until the next evening, when they were arrested in another county, and part of the property stolen from the store was found on one of them. When arrested they were sitting around a fire which they had lighted close to a railway track, and one of them was armed with a revolver. The carrying of the revolver, and probably also the building of the fire, was a criminal offense, in the commission of which they were all confederates. In an action against them for the burglary of the store, the above facts, being conclusively proven, are *held* to establish a conspiracy and confederacy between them to commit crimes of the same nature during the night the burglary was committed, and to justify an instruction that the fact that a part of the stolen property was in the possession of one of them might be considered in determining the guilt of the others.

ERROR to the Circuit Court for *Racine* County.

An information was duly filed in that court, charging that at Dover in said county, on the 19th day of October, 1892, in the night time, the plaintiffs in error broke and entered the store of one Anton Miller with intent to commit larceny, and did steal, take, and carry away therefrom certain specified goods and property of Miller, of the value of $250. The plaintiffs in error all pleaded not guilty to the charge in the information. A trial resulted in a verdict of guilty against all of them.

The testimony given on the trial is sufficient to have jus-

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tified the jury in finding the following facts: During the forenoon of October 19, 1892, the five plaintiffs in error and another person were together at Kansasville, a station on the railway in the town of Dover, Racine county, three miles west of Union Grove on the same railway. These persons came to Kansasville together from the north, and remained loafing there together about two hours, and then left there together, going in the same direction from whence they came. About one fourth of a mile north of Kansasville, the road on which they left intersects an east and west road leading from Union Grove to Burlington, which is eight or ten miles west from Kansasville on the same railway. The plaintiffs in error went to Union Grove together, and laid in or under a haystack together, near the depot, until about 7 o'clock in the evening, when they climbed on a west-bound passenger train, but did not go into the coaches. They refused to pay fare, and were expelled from the train at Kansasville, and lounged about the place together during the evening. One of them borrowed a pail of Miller, and they had it filled at a saloon three or four times with beer, which they drank together. At about 10 o'clock, after the saloon was closed, they again went north together. Before leaving, one of them declared their intention to walk to Burlington that night, but the others were not present. When they reached the east and west road before mentioned, they went into the outbuildings of Mr. Collar, who resides at the junction of the two roads, and while there together, or in close proximity to each other, three of them struck matches and stole chickens of Mr. Collar from their roost. At midnight Mr. Miller was aroused by a noise made by a neighbor's dog, and, going to his store, which he had closed and locked two hours earlier, he found it had been broken open and the goods described in the information stolen therefrom.

The plaintiffs in error lay that night, or a part of it,

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together in a haymow on what is known as the Laven place, west of Mr. Collar's, on the Burlington road, and left that neighborhood together early the next morning, going west. Of the property thus stolen from Miller's store, a bundle of stockings was found concealed in a stack on the Laven place (upon which no one resided), and a bag of shoes was found in a stack on a neighboring farm. The bag had Mr. Collar's name on it, and evidently belonged to him. On the evening of October 20th, the day following the night that the burglary was committed, the plaintiffs in error were found together at the crossing of two railroads,— the Kenosha & Rockford and Wisconsin Central,— near Silver Lake station on the Central, in the west part of Kenosha county, and were there arrested and searched. A pair of clippers and a razor, fully identified as part of Miller's stolen goods, were found on one of them. *Young*, upon whose person these articles were found, testified that he stole them from Miller's store when he borrowed the pail, but Miller testified to conditions and circumstances which, if they existed, rendered it impossible that *Young's* story could be true. When arrested, the plaintiffs in error were sitting by a fire they had lighted near the railroad track, and one of them was armed with a revolver. They testified on the trial as witnesses in their own behalf, and each denied any complicity in the burglary charged.

The court refused to give the following instructions, except as given in the general charge to the jury: "No jury should convict a person of crime upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there is strong reason to suspect that he is guilty; but, before the jury can lawfully convict, they must be convinced of the defendant's guilt beyond all reasonable doubt."

Speaking of the circumstance that part of the stolen property was found upon *Young*, the court said to the

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jury: "You may also consider it, in connection with all the other evidence, facts, and circumstances in the case, in determining the guilt of the other defendants."

The court denied a motion on behalf of the plaintiffs in error for a new trial, adjudged them guilty of the offense charged in the information, and sentenced them to various terms of imprisonment in the state prison. The following errors are assigned for a reversal of the judgment: "*First*, in refusing to instruct the jury against a conviction based upon suspicion, as requested by the defendants; *second*, in instructing the jury that they might consider the fact that the defendant *Young* had in his possession certain property taken from the store of Anton Miller, in determining the guilt of the other defendants; *third*, in refusing to set aside the verdict of the jury in said action, and to grant the defendants a new trial therein, for the reason that the evidence in said action was insufficient to warrant and sustain the verdict of guilty as against the defendants." These alleged errors are considered in their order in the following opinion.

For the plaintiffs in error the cause was submitted on a brief by *Thomas M. Kearney*, attorney for *Thomas Kennedy*, and *H. A. Cooper* and *Wallace Ingalls*, attorneys for *Jerry Murphy*, *Frank Rice*, *John Young*, and *James Crane*.

For the defendant in error the cause was submitted on the brief of the *Attorney General* and *J. M. Clancey*, Assistant Attorney General.

LYON, C. J. 1. Was it error to refuse to give the proposed instruction to the effect that the plaintiffs in error should not be convicted upon mere suspicion? The learned circuit judge instructed the jury that, to justify a conviction, "no mere weight of evidence is sufficient unless it excludes all reasonable doubt (not unreasonable) as to the guilt of any of the defendants. The proof of guilt must be

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inconsistent with any other rational supposition." These rules were repeated and enforced in other portions of the charge. We think the charge contains a correct statement of the rules of evidence in criminal cases, and is the complete equivalent of the proposed instruction, for it is evident that testimony which raises only a mere suspicion of guilt is not, and in the nature of things cannot be, inconsistent with any other rational hypothesis. A mere suspicion is such because there is some reasonable hypothesis against it. Besides, under the proof, there seems to have been no necessity for an express instruction that the jury must not convict on mere suspicion, for there is abundant undisputed evidence in the case tending to prove the guilt of all the plaintiffs in error. This fact takes the case out of the range of mere suspicion, and renders the question of innocence or guilt one of fair and proper inference from facts proved. We conclude that the refusal to give the proposed instruction except as given in the general charge was not error.

2. Was it error to instruct the jury that the finding of a part of the stolen property in possession of one of the plaintiffs in error was a circumstance to be considered by the jury, with all the other facts and circumstances proved in the case, in determining the guilt of the other plaintiffs in error? The argument, if we understand it correctly, is that it was incumbent on the prosecution to establish an existing conspiracy or confederacy between the plaintiffs in error to commit crime, before the fact that part of the stolen property was found on one of them could properly be received as evidence against the others. We understand this to be a correct statement of the rule of evidence. At any rate, we assume it to be correct for the purposes of this case. The court did not submit to the jury the question of such conspiracy or confederacy between the plaintiffs in error. Hence it would seem that unless the same

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was conclusively proved on the trial the instruction under consideration was erroneous. The question is, therefore, Was the existence of such conspiracy or confederation conclusively proved?

When the offense charged in the information was committed, and immediately before and after that time, none of the plaintiffs in error had any visible means to maintain himself, and each of them was an idle person living without employment. Each was wandering about, and living in outhouses and barns, and in the open air, and failed to give a good account of himself. Each of them was, therefore, a vagrant, and vagrancy is a crime punishable by imprisonment. R. S. secs. 1543–1546. As such vagrants, they associated and confederated together to continue their criminal career. All of them were adults, and in the execution of such criminal purpose they wandered together into the village of Kansasville, of which village none of them were residents, and none of them were called there on any lawful business or for any lawful purpose. Thus, they were tramps, as well as vagrants, and it is also a crime to be a tramp. S. & B. Ann. Stats. sec. 1547*d*. These crimes they conspired and confederated together to commit. Acting together as confederates, they attempted to steal a passage on a railway train from Union Grove to Burlington without paying fare, and after boarding the train they refused to pay fare. This was an unlawful, if not a criminal, act, and they were joint trespassers on the train. After being ejected from the train at Kansasville they continued together their criminal career as vagrants and tramps until late at night, when they went to Mr. Collar's place, and, when substantially together and acting in concert, three of them committed the crime of larceny by stealing Mr. Collar's fowls. In the commission of this crime they are also chargeable as confederates. This brings the joint career of the plaintiffs in error down to within less than two

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hours (probably within an hour) of the time Miller's store was broken, entered, and robbed, and leaves them within eighty rods of the store. After the store was robbed they remained substantially together, wandering through the country to the west and southwest, until they were arrested the next evening in another county, and part of the property stolen from the store was found on one of them. When arrested they were sitting around a fire they had lighted close to the railroad track. One of the party was armed with a revolver. The carrying of a revolver by a tramp, and probably the building of the fire, were also criminal offenses, made such by said sec. 1547*d*, subd. 4, in the commission of which all the plaintiffs in error were confederates.

The proof of most of the above facts is undisputed, and the proof of all of them is so overwhelming that the trial court was abundantly justified in regarding them as verities in the case. The crime charged in the information is one against property. It requires no argument or citation of authorities to demonstrate that the evidence sufficiently establishes the conspiracy and confederacy between the plaintiffs in error to commit crimes of the same nature during the night the offense charged in the information was committed, and to justify the giving of the instruction under consideration, without submitting to the jury the question of the existence of such conspiracy and confederacy.

3. The remaining error assigned, which is to the effect that a new trial should have been granted for insufficiency of proof, is fully answered by what has already been said. We conclude that the testimony is sufficient to sustain the conviction of all the plaintiffs in error.

By the Court.— The judgment of the circuit court is affirmed.

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THE STATE EX REL. JONES, Respondent, vs. OATES, Appellant.

December 2 — December 29, 1893.

Office and officer: Rights of person holding certificate of election: De facto *officer: Proceeding to obtain possession:* Mandamus: *Practice: Immaterial error.*

1. One who has been declared by the proper canvassing board to have been elected to an office, and has received the proper certificate of election, and has duly qualified, has the *prima facie* right to the office and is entitled to possession thereof, when his term begins, as against every one except a *de facto* officer in possession under color of authority.
2. An officer who retains possession of the office after his term, claiming that he was in fact re-elected, but without other color of authority, is not a *de facto* officer as against the person who holds the certificate of election and has qualified.
3. *Mandamus* is the appropriate remedy in such a case to enforce the right of the person having the *prima facie* title to the office. The remedy under secs. 977, 983, R. S., by proceedings to compel delivery of books and papers, is not adequate, where possession of the seal of the office and the moneys appertaining thereto is also desired.
4. The fact that the person so retaining possession of the office and claiming to have been re-elected did receive the greater number of legal votes at the election cannot be pleaded as a defense in the *mandamus* proceedings as against the relator's *prima facie* title. The contest should be made on *quo warranto*.
5. An error in overruling an objection to an alternative writ of *mandamus* on the ground that it was signed by the judge instead of the clerk and was not under seal, is *held* not to affect any substantial right and hence not to be one for which the judgment awarding a peremptory writ should be reversed.

APPEAL from the Circuit Court for *Grant* County.

Mandamus to compel delivery of the moneys, records, books, papers, seals, and other property belonging to the office of the clerk of the circuit court for La Fayette county.

It appears by the relation that the relator and the appel-

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lant were rival candidates for said office at the general election held November 8, 1892, the appellant then being the incumbent of said office; that the county canvassers decided that the relator received 2,343 votes, and the appellant 2,342 votes, and the county clerk thereupon issued to relator a certificate of election in due form of law; that relator duly qualified by giving the bond and taking the oath required by law; that his bond was duly approved and deposited with the register of deeds of said county; that on the 10th of January, 1893, he demanded of appellant possession of the moneys, records, books, papers, seals, and other property of the office, but that appellant refused to surrender them, and has ever since pretended, without right, to discharge the duties of said office and receive the fees thereof.

Upon this relation an alternative writ of *mandamus* issued out of the circuit court, to which appellant made return, admitting that the parties were rival candidates for said office at the general election in 1892. The return further substantially admitted the canvass of the votes, the issuance of the certificate to the relator, and the relator's qualification for the office, setting forth, however, some alleged defects in the canvass and the giving of the bond which are not regarded as of sufficient importance to state. The return then states as a defense that the appellant in fact received at such election 2,346 votes, and was elected by a majority of three votes; that four of the votes so cast for him at a certain precinct, though cast by legally qualified electors, were not counted for him by the inspectors, but were returned as defective, because they were indorsed by one ballot clerk only, instead of by both ballot clerks or by one ballot clerk and an inspector; that it was by the throwing out of these four votes that the relator's apparent majority was secured. The return further states that appellant duly qualified for the office by giving bond and

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taking the oath of office, and claims that he has been and is now clerk of such court, and will continue to be such until the first Monday in January, 1895.

The relator demurred to the return as insufficient to constitute a defense or counterclaim, and the circuit court sustained such demurrer and ordered the issuance of the peremptory writ of *mandamus* as prayed in relation. *Oates* appeals.

For the appellant there was a brief by *Orton & Osborn* and *Wilson & Martin*, and oral argument by *P. A. Orton*.

For the respondent there was a brief by the *Attorney General* and *Murphy & Gardner*, and oral argument by *J. M. Murphy* and the *Attorney General*.

WINSLOW, J. It clearly appears by the statements of the relation and the expressed or implied admissions in the return that the relator was declared elected to the office of clerk of the circuit court of La Fayette county by the county board of canvassers of that county; that he received the proper certificate of election to that office; and that he qualified therefor as required by law; also that the defendant was the former incumbent of the office, and has retained possession of the same after the expiration of his term without certificate, commission, or other semblance of authority or right, but he claims that he can show that he in fact received the greater number of votes for the office.

The question first presented is, What effect is to be given to the canvass and certificate of election? Is the canvass a mere exercise in addition, to ascertain which column of figures is the greater? Is the certificate only a trophy given to the victor in the electoral battle, which is good for nothing except to exhibit to admiring friends or hang upon the wall as an evidence of political prowess? If these questions are to be answered in the affirmative, then the canvass and the issuance of the certificate are evidently as

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useless as they are harmless. We think, however, that there is a substantial right conferred by the canvass on the person declared to be elected, of which right the certificate is the legal evidence. The canvass is for a purpose. It is to determine who was elected to the office. It is conducted by a tribunal created by the law to ascertain and decide that very question, and its determination must have some effect. Now, the effect which it has plainly must be to determine who is elected to the office. Not necessarily to determine the fact permanently or beyond the possibility of revision or reversal, but to determine the fact for the time being and until a different result be reached in a proper proceeding to contest the title of the certificate holder to the office. As against any intruder in the office, and in fact as against all the world except a *de facto* officer in possession of the office under color of authority, the fact is settled by the determination of the canvassers until, in a proper proceeding, that determination is reversed. This doctrine is in accordance with the uniform current of authority. McCrary, Elect. §§ 204–221, and cases cited; Merrill, Mand. § 142.

A moment's reflection will convince any mind that this is not only a reasonable doctrine, but the only doctrine which can be tolerated. There will arise many disputed elections. It may sometimes consume much time to determine finally and conclusively who was elected. In the mean time the public welfare imperatively demands that the office be occupied by some one empowered to discharge its duties. Who shall it be? Shall it be the man who bears the certificate and has in his favor the adjudication of the tribunal created by law to primarily decide that question, or shall it be by an intruder, with no color of authority, with neither certificate or commission of any kind, who, by accident being in possession of the office, says that he was in fact elected thereto? There can be but one reasonable answer to this question. Plainly, the man with the certifi-

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cate and the canvass in his favor must be admitted to the office, until a competent tribunal reverses the decision of the canvassers. Any other doctrine would be subversive of all law and order. The prior incumbent could as well turn over the possession of the office to another defeated candidate, on the pretense that he knew this other candidate was really elected, as to hold possession himself. Thus, the prior incumbent would become the judge of the *prima facie* title to the office, instead of the canvassing board. The opportunities thus afforded to defeated candidates to temporarily thwart the will of the people need only be suggested; they need not be dwelt upon.

It seems very clear to us that the power to decide the *prima facie* right to an office lies with the canvassing board.

This *prima facie* right, if it means anything, must mean that the person having it has the right to the possession of the office and its books, papers, and other property, when his term of office begins, if he has duly qualified. To this, we think, there is but one exception, and that is when the office is already filled by a *de facto* officer. There has been much discussion as to what will constitute a *de facto* officer. It is not material here to consider who may be a *de facto* officer as to third persons and the public in general. The question is, Who is a *de facto* officer, as against the person holding a certificate of election, who has duly qualified as required by law? On this question the law is well settled. A *de facto* officer is one who is in possession of an office and discharging its duties under color of authority. McCrary, Elect. (3d ed.), § 218; 2 Dill. Mun. Corp. § 892. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer. McCrary, Elect. § 218. Tested by this rule, it is apparent that the defendant is in no proper sense a *de facto* officer as against the relator. There has been no canvass or deter-

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mination by any one in his favor, nor has he any certificate, commission, or authority from any person, officer, or board purporting to authorize him to discharge the duties of the office.

The defendant not being a *de facto* officer, it was his duty to surrender to the relator the property of the office at the commencement of the relator's term. Such a surrender would have been simply a recognition of the relator's *prima facie* title to the office under the canvass and certificate. It would not have affected any right the defendant might have to contest the election of relator in a proper proceeding. If it was the right of relator to be admitted to the office under his *prima facie* title, and hold it pending a contest, it is evident that the right may be enforced by *mandamus*. Blackstone says the writ issues in "all cases where a party hath a right to have a thing done, and hath no other specific means of compelling its performance." 3 Bl. Comm. 110. The authorities are numerous that *mandamus* is the appropriate remedy in such a case. Merrill, Mand. §§ 142, 143; *People ex rel. Cummings v. Head*, 25 Ill. 325; *Crowell v. Lambert*, 10 Minn. 369; *State ex rel. Atherton v. Sherwood*, 15 Minn. 221; *State ex. rel. Biggs v. Churchill*, 15 Minn. 455; *State ex rel. Meckling v. Jaynes*, 19 Neb. 161.

It is said that the relator has an adequate remedy, under the statute, by proceedings to compel the delivery of books and papers. R. S. secs. 977, 983. It is quite evident that these statutory provisions afford no adequate remedy to the relator. They provide only for the delivery of books and papers. In the present case the seal of office and the moneys appertaining thereto are also desired, and neither could be obtained by a proceeding under the statute. We think the statutory proceeding inadequate.

Having held that the relator had a clear right to the possession of the office and its property under his *prima facie* title, and that *mandamus* is the appropriate remedy to en-

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force that right, the case is practically disposed of. The relator's right to possession under his *prima facie* title is not affected by the fact that defendant may be able in *quo warranto* proceedings to successfully contest relator's *prima facie* title. Pending such contest, as we have seen, the relator's right to possession is perfect as against every one except a *de facto* officer holding under color of authority; and defendant is not such an officer. This makes it very plain that the defendant's allegations tending to show that he received the greater number of legal votes at the election were not pleadable as a defense to this *mandamus* proceeding; hence we express no opinion on the question whether the four votes which lacked the signature of one ballot clerk were in fact legal votes or not. It is a most interesting question, and by no means free from doubt, but it cannot properly be decided here.

Judgment for the relator in these *mandamus* proceedings does not determine the final rights of the parties; it simply determines that relator had a right to immediate possession under his *prima facie* title. It might perhaps determine the final right had both parties chosen to litigate it in this proceeding, but the relator has not chosen to litigate it, but has, by demurrer, challenged the sufficiency of the return. *Mandamus* is not the proper proceeding in which to contest an election. *State ex rel. Mercer v. Sullivan*, 83 Wis. 416.

It appears that the alternative writ in this case was defective in that it was signed by the circuit judge instead of the clerk of court, and it did not bear the seal of the court. The objection was duly taken by motion, but overruled. The alternative writ is, however, little more, in legal effect, than an order to show cause. *People v. New York Common Pleas*, 13 Wend. 649–655, note. Strictly, probably the objection should have been sustained, but we do not re-

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gard the error as affecting any substantial right, and shall not reverse the judgment on that account. R. S. sec. 2829.

The questions involved in this case were very fully discussed by the late Mr. Justice TAYLOR in the case of *Supervisors v. O'Malley*, 46 Wis. 35, and the conclusions there stated are identical with the conclusions reached in this opinion, and stated, perhaps, with greater force and perspicuity. Inasmuch, however, as that case was not a contest between the parties claiming the office, and these questions were only collaterally involved, we have deemed it proper to review the question as an original one.

By the Court.— Judgment affirmed.

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CASES DETERMINED

AT THE

January Term, 1894.

MURPHEY, Appellant, vs. WEIL, Respondent.
MURPHEY, Respondent, vs. WEIL, Appellant.

January 9 — January 30, 1894.

(1) *Appealable order: Motion for judgment.* (2, 3) *Admission of fact on trial: Bill of exceptions: Returning record for correction.*

1. An order denying a motion for judgment on the minutes and special verdict, not followed by judgment for the opposite party, affects a substantial right and is appealable.
2. A fact admitted in open court on the trial is one of the facts in the case, as much as the finding of a special verdict.
3. Upon an appeal from an order granting a new trial on the ground that the findings of the special verdict were inconsistent, the bill of exceptions contained only the special verdict, although respondent had asked the insertion therein of an admission of an important fact, made on the trial. On respondent's motion the record is returned to the trial court, in order that motion may there be made for correction of the bill of exceptions.

APPEALS from the Superior Court of *Milwaukee* County.

The facts are stated in the opinion.

The motions were argued by *N. S. Murphey*, plaintiff, in person, and by *W. H. Timlin* and *J. G. Flanders* for the defendant.

PER CURIAM. The action was tried by a jury, who returned a special verdict. There are two appeals. Plaintiff

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appealed from an order setting aside the special verdict and granting a new trial on the ground that the findings of the special verdict are inconsistent. Defendant appealed from an order denying his motion for judgment upon the minutes of the court and the special verdict.

The plaintiff moves to dismiss the defendant's appeal on the ground that the order is not appealable. We think it is appealable. It was not followed by judgment for the opposite party, from which an appeal could be taken; so the order clearly affects a substantial right, namely, the right to have the question of the defendant's right to a judgment upon the verdict passed upon by this court. *Robinson v. Washburn*, 81 Wis. 404.

Upon plaintiff's appeal a bill of exceptions was settled by the court, consisting simply of the special verdict. It appears by affidavit that an admission of a very important fact in the case was made in open court on the trial. This admission was not incorporated in the bill of exceptions, though defendant proposed an amendment to that effect. Defendant moves that the bill of exceptions be returned, so that the same may be corrected by inserting such admission. We do not determine now what the effect of the admission may be, nor can we order the trial court, upon this motion, to insert matter in the bill of exceptions; but in our opinion the admission was proper to be inserted in the bill, and should be there, inasmuch as a fact admitted on the trial is one of the facts in the case, as much as the finding of the special verdict.

The plaintiff's motion to dismiss will be denied, and the defendant's motion to return the record to the superior court of Milwaukee county, in order that motion may be there made for correction of the bill of exceptions, will be granted.

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IN RE RADL.

January 9 — January 30, 1894.

Writ of prohibition: De facto *judicial officer.*

1. A writ of prohibition will not issue to test the title of a *de facto* judicial officer.
2. Where the office of justice of the peace in a city exists *de jure*, a person appointed by the common council to fill a vacancy in such office, and who has qualified, is a *de facto* officer, even though the council had no power to make such appointment.

PETITION for a Writ of Prohibition.

The facts are stated in the opinion.

Rublee A. Cole, for the petitioner.

W. S. Stroud, *contra.*

PER CURIAM. It appears that F. M. Shaughnessey was appointed a justice of the peace by the common council of Portage, to fill a vacancy made by the resignation of another. Thereupon an action was commenced before such justice, and a summons issued by him in favor of one Charles Chislow and against the petitioner herein, *Charles Radl.* Upon the return of the summons served upon *Radl*, he applied to this court for a writ of prohibition to perpetually restrain such justice from taking any steps or exercising any jurisdiction in the cause, on the ground that the common council had no lawful authority to fill such vacancy by appointment.

Assuming such to be the facts, still, as there was such an office *de jure* in the city as justice of the peace to be filled, and as the person who here acted was ostensibly appointed to fill that office and qualified, we must regard him as being such officer, at least *de facto*, and hence must hold that he had jurisdiction in the case, and that his official acts were binding upon the parties. *In re Boyle*, 9 Wis.

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264; *State v. Bloom*, 17 Wis. 521; *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 627, 629; *Baker v. State*, 69 Wis. 37; *In re Burke*, 76 Wis. 357; *In re Manning*, 76 Wis. 365, affirmed in 139 U. S. 504. This court has held that under our statutes such writ issues only to restrain the acts of a court or other inferior tribunal exercising some judicial power which it has no legal authority to exercise. R. S. secs. 3457–3462; *State ex rel. Kellogg v. Gary*, 33 Wis. 93. It would seem that the writ is not to be applied to any officer or body on whom the law confers no power of pronouncing any judgment. *In re Godson*, 16 Ont. App. 452. "A writ of prohibition will not issue when there is any other adequate remedy." *State ex rel. Rogers v. Burton*, 11 Wis. 51; *State v. Commissioners of Roads*, 12 Am. Dec. 596; *Smith v. Whitney*, 116 U. S. 167; *Queen v. Local Government Board*, 10 Q. B. Div. 309. Here the petitioner appears to have another adequate remedy.

The precise question here presented has been recently determined by the supreme court of Minnesota. It was there properly held that "a writ of prohibition will not lie to test the title of a *de facto* judicial officer." *State ex rel. Derusha v. McMartin*, 42 Minn. 30.

The writ is denied.

THE STATE EX REL. RADL VS. SHAUGHNESSEY.

January 9 — January 30, 1894.

Supreme court: Original jurisdiction: Quo warranto.

This court declines to take original jurisdiction of a proceeding in the nature of *quo warranto* to try the title to office of a justice of the peace in the city of Portage, the question presented not being one which affects the state at large.

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A MOTION was made in this court on behalf of *Charles Radl* for leave to file an information in the nature of *quo warranto*. The facts are stated in the opinion.

Rublee A. Cole, for the relator.

PER CURIAM. F. M. Shaughnessey is an acting justice of the peace in Portage. As such justice, he issued a summons, which was served upon the relator, in favor of Charles Chislow. The relator contends that Shaughnessey was appointed by the common council of Portage to fill a vacancy caused by the resignation of another, and that the common council had no authority to make such appointment; and he therefore seeks in this proceeding to have Shaughnessey's title to such office determined by this court in this action. There can be no question but that the circuit court has jurisdiction, upon a proper application, in such a case. Const. art. VII, sec. 8; R. S. sec. 3463 *et seq.* Since the decision in *Attorney General v. Railroad Cos.* 35 Wis. 425, 521, *et seq.*, this court has refused to take original jurisdiction in the class of cases mentioned in sec. 8, art. VII, of the constitution, except where it affects the state at large, this court judging of the contingency in each case for itself. *State ex rel. Wood v. Baker*, 38 Wis. 71, 77; *State v. St. Croix Boom Corp.* 60 Wis. 565. The question here presented does not so affect the state at large.

The writ is denied.

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WILLIAMS, Respondent, vs. GIBLIN, Appellant.

January 9 — January 30, 1894.

Appeal: Taxation of costs: Sixty days after "finding" is filed.

Ch. 202, Laws of 1882 (S. & B. Ann. Stats. sec. 2894*a*), providing that judgment shall be entered without costs if the successful party fails to enter and perfect it within sixty days after "the *finding* of a court shall be filed," does not apply to decisions rendered by the supreme court upon appeal from lower courts.

APPEAL from the Circuit Court for *Rock* County.

Motion to vacate the taxation of costs in the supreme court, after affirmance of the judgment appealed from.

F. J. Lamb, in support of the motion.

H. S. Sloan, *contra.*

PER CURIAM. The judgment of the circuit court in this case was affirmed in this court October 17, 1893. *Ante*, p. 147. Cost were not taxed until December 18th following. Motion is now made by appellant to vacate the taxation of costs because they were not taxed within sixty days after the decision of the case, and reliance is placed on ch. 202, Laws of 1882 (S. & B. Ann. Stats. sec. 2894*a*). This section provides, in substance, that whenever the finding of a court shall be filed, or the verdict of a jury shall be rendered, the successful party shall enter and perfect judgment thereon within sixty days thereafter; otherwise judgment shall be entered without costs.

We are satisfied that this statute does not apply to decisions rendered by this court upon appeal from lower courts. The term "finding" is universally used by the profession and by the courts as meaning the decision of a trial court upon the facts. R. S. secs. 2870, 2871. The term is never used, to our knowledge, either in the statutes or in common parlance, to designate the decision of this court

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upon appeal. Words are to be construed according to their usual and common acceptation. *O'Neill v. Pleasant Prairie M. F. Ins. Co.* 71 Wis. 621.

The motion will be denied.

COTTRELL, Appellant, vs. SHEPHERD, imp., Respondent.

January 9 — January 30, 1894.

Limitation of actions: Part payment by grantee of mortgaged land.

Payments by a grantee of mortgaged land who, as part of the consideration, assumed and agreed to pay the mortgage, cannot be imputed to the mortgagor so as to remove the bar of the statute of limitations as against him.

APPEAL from the Circuit Court for *Outagamie* County.

Action to foreclose a mortgage. The facts are stated in the opinion. The plaintiff excepted to the refusal of the trial court to order judgment for any deficiency against the defendant *Henry Shepherd*, and appealed from the judgment of foreclosure, which does not contain such an order.

For the appellant the cause was submitted on the brief of *Gerrit T. Thorn.* He contended, *inter alia*, that the mortgagee could regard both *Shepherd* and his grantee, who assumed the debt, as principal debtors; that *Shepherd* by his acts had made his grantee his agent to make payments; and that payments made by the grantee were the same as if made by *Shepherd* himself. *National Bank v. Cotton*, 53 Wis. 31; *Marshall v. Holmes*, 68 id. 555; *Clement v. Clement*, 69 id. 599; *Corbett v. Waterman*, 11 Iowa, 86; *Cross v. Allen*, 141 U. S. 528; *Tuttle v. Armstead*, 53 Conn. 175; *Calvo v. Davies*, 73 N. Y. 215; *Rubens v. Prindle*, 44 Barb. 336; *Waters v. Hubbard*, 44 Conn. 340; *Burr v. Beers*, 24

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N. Y. 178; *Mechanics' Sav. Bank v. Goff*, 13 R. I. 516; *Flagg v. Geltmacher*, 98 Ill. 293; *Torrey v. Bank*, 9 Paige, 649.

For the respondent there was a brief by *Goldberg & Hoxie*, and oral argument by *Benj. M. Goldberg*.

ORTON, C. J. This is an action to foreclose a mortgage executed by the defendant *Henry Shepherd* and Margaret, his wife, to the plaintiff, on certain premises, on the 19th day of October, 1877, to secure a note given by and to the same persons, of $250, at the same time, with ten per cent. interest, payable the 1st day of June, 1883. The action was commenced August 9, 1890. On the 29th day of June, 1878, the said defendants sold and deeded the mortgaged premises to one Louis Roussau in consideration of $310, and said deed contained a covenant against incumbrances, except the said mortgage, and it was agreed verbally that Roussau was to pay said mortgage as a part of said consideration, and Roussau paid to the defendants $60, and on the mortgage $50, at the time of the sale, and has paid since the interest on the note to July 7, 1888, and $50 more on the principal in 1881. The balance due on the note and mortgage, at the time of the judgment, of principal and interest, was $237, for which judgment was rendered, as also for $40 solicitor's fees. The said Roussau was made defendant, but made no answer, and his equity of redemption, as well as that of *Shepherd* and wife, was foreclosed. The plaintiff asked judgment for any deficiency after the sale against the said *Henry Shepherd*, but did not ask for any such personal judgment against said Roussau. The defendant *Shepherd* answered, setting up the statute of limitations on the note as a bar to any such personal judgment against him for any such deficiency, and, this having appeared, no judgment for the same was rendered or ordered against him.

These are the material facts. The error assigned is that

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the court held that the statute was a bar to any personal judgment against *Shepherd*, and refused to embrace in the judgment of foreclosure any such order. The learned counsel of the appellant contends that the payments of interest and part of the principal of the note within the period of limitation, by Roussau, the grantee, should be held to have been made by the said *Shepherd*, and that they removed the bar of the statute as to him, because Roussau occupied the relation of a joint debtor with, or agent of, *Shepherd*. This is the only question in the case.

The authorities cited by the learned counsel are not in point with this case, but are claimed to be the same in principle, as showing by analogy that Roussau, as such grantee subject to the mortgage and promising to pay the same, was a joint debtor or agent of *Shepherd*, or that his relation to him was in principle the same. There was no personal judgment asked against Roussau, and he did not answer; but the fact that he was such grantee of the Shepherds, and promised to pay the mortgage, and had made such payments on the mortgage, came into the case as matters of evidence, in order to show that the statute had not run as to *Shepherd* by reason of said payments.

We do not think such payments by Roussau can have such effect. The following reasons appear to be sufficient for so holding: (1) Roussau was not a joint debtor, or jointly liable, with *Shepherd*. It is true, he promised *Shepherd* to pay the note, and became liable to pay it; but the plaintiff, as mortgagee, was not a party to such promise, and has not yet accepted the benefit of it, and has not sought to hold him liable on it. It has never become a *novation*. The plaintiff is not bound to pursue his remedy against Roussau. (2) Roussau did not make the payments for the benefit of *Shepherd*, but for his own benefit, to protect his equity of redemption or interest in the premises. *Shepherd* had no interest in the premises any longer to pro-

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tect. It was immaterial to him whether Roussau paid the note or not, as far as the mortgage was concerned, for Roussau had bought the premises subject to the mortgage, and had promised to pay it, and he must pay it or lose his land. *Shepherd* had no interest in it, except to protect himself against any deficiency after the sale of the premises. *Shepherd* made the note, and is liable to pay it. He is the only party to whom the plaintiff looks for payment. He *ignores* Roussau as a party to the note, or as liable to pay it. Roussau made some payments on the mortgage, and the plaintiff received them, as he was bound to do, for Roussau stood then in the place of the mortgagor owning the equity of redemption. He made them, however, for himself alone and for his own protection. He did not do it as the agent of *Shepherd* in any sense, but was acting for himself alone. He did not profess to be acting for any one except himself, and it is not shown that *Shepherd* knew at the time that he was making the payments, or that he notified him of it. It would appear to be very unreasonable, as well as unjust, to impute these payments to the defendant *Shepherd* to have the legal effect of a new promise on his part to pay the note within the period of limitation. Roussau was not liable on the note, and could not be sued upon it. He could only be held liable, if at all, by the foreclosure of the mortgage. Then, by what authority could he make an acknowledgment for the defendant *Shepherd* that the note was still a subsisting indebtedness against him. The plaintiff's relations to the note and to *Shepherd* as the maker of it were not changed in the least by Roussau's purchasing the land subject to the mortgage, nor was *Shepherd's* liability to the plaintiff on the note changed or affected by it. The plaintiff and defendant *Shepherd* occupied the same relations towards each other as they did before. I can conceive of no process of reasoning by which these payments by Roussau can be made to be, in law, pay-

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ments made by the defendant *Shepherd*, and I have not been able to find any case in the reports as authority for it.

This question is new in this court, and I think it could not have often arisen anywhere. The case of *Trustees v. Smith*, 52 Conn. 434, seems to be closely in point. That was a mortgage on certain tracts of land to secure a note for $2,850 as the purchase money for the land. The mortgagor sold the premises subject to the mortgage, and the grantees promised to pay it as a part of the consideration. The grantees had made payments of interest on the note within the period of limitation. The maker of the note set up the statute as a bar. He had never made any payments on the note himself, unless such payments by the grantees could be imputed to him, and it was held that such payments did not remove the bar of the statute or operate as a new undertaking or promise. Chief Justice PARK, who wrote the opinion, said: "The defendant was directly and personally liable on the note, and when he conveyed the land mortgaged to his grantees on their assumption and promise to pay the note as a part consideration of the purchase the transaction altered in no respect whatever the liability of the defendant on the note. Neither did it increase or diminish the remedies of the plaintiffs. They could pursue the defendant on the note, or the lands in the hands of the grantees, just as well as before. . . . Their liabilities are separate and distinct. Neither party could do anything to increase the liability of the other. How could the grantees, by any act of theirs, acknowledge that the mortgage debt was a subsisting indebtedness, so as to subject the defendant to a new liability upon it, when they themselves were not liable on the note? We think the grantees could do nothing by word or deed to remove the bar of the statute of limitations so far as the defendant is concerned." We think this decision is supported by the

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clearest reasons, and any decision to the contrary would be without and against reason.

In *Harlock v. Ashberry*, 18 Ch. Div. 229, the tenant of the mortgagor, in possession of the mortgaged premises, was required by the mortgagee to attorn and pay the rent to him, and the tenant did pay five pounds sterling on the rent, and it was received as so much payment on the mortgage. This payment was set up as having removed the bar of the statute as against the mortgagor. The case was tried before Mr. Justice FRY, and he held the payment had such effect, but on appeal (19 Ch. Div. 539) the Master of the Rolls, Sir GEORGE JESSEL, and the Lords Justices, Sir WILLIAM BALIOL BRETT, and Sir JOHN HOLKER, held the other way,—that it did not remove the bar of the statute as to the mortgagor. The reasons given were that the mortgagor could not prevent the payment, however much he might have disapproved of it at the time; and that it was a payment of rent, and as rent, and not as a payment on the mortgage for the benefit of the mortgagor, either as principal or interest.

Inasmuch as such payments, to remove the bar of the statute, must have the effect of an acknowledgment of the debt or a new promise, they should be made by some person who had the right to acknowledge the debt or to make the new promise,— either the mortgagor or his authorized agent. In application to this case, the grantee had the right to make payments for himself to save his land, but had no right to make such payments for and on behalf of the mortgagor, as an acknowledgment of his debt or as a new promise on his part. Conversely: "A mortgagor who sells the land subject to the mortgage cannot, by his subsequent acknowledgment or payments of interest, toll the statute as to his grantees." *Lord v. Morris*, 18 Cal. 482–490; *Zoll v. Carnahan*, 83 Mo. 35; *Schmucker v. Sibert*, 18

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Kan. 104; *Day v. Baldwin*, 34 Iowa, 380; *Newbould v. Smith*, 33 Ch. Div. 127; 13 Am. & Eng. Ency. of Law, 761. In such cases it seems clear that neither the mortgagor nor the grantee, by acknowledgment or payments, can remove the bar of the statute as to the other.

The ruling of the circuit court, refusing to order a personal judgment against the defendant *Shepherd* for any deficiency after sale of the mortgaged premises, was not erroneous, and the judgment without such order is correct.

By the Court.— The judgment of the circuit court is affirmed.

BECKMAN and wife, Appellants, vs. BECKMAN and wife, Respondents.

January 9—January 30, 1894.

Deeds: Consideration: Parol evidence.

A conveyance of their homestead by parents to their son, and a mortgage back, showed that the only consideration which he agreed in writing to pay was wholly inadequate, and that he had made some kind of an oral agreement as to the balance of the consideration. In an action by the parents for a cancellation of the deed, it is *held* that the true consideration and the time and manner in which it was to be paid might be shown by parol.

APPEAL from the Circuit Court for *Outagamie* County.

The defendant *John Beckman, Jr.*, is the son of the plaintiffs. On November 10, 1881, the plaintiffs owned and occupied the forty acres of land described, as a homestead, and their son *John*, who was then about twenty-one years of age, resided with them thereon. On November 10, 1881, the plaintiffs, by warranty deed with full covenants, conveyed said forty acres to the defendant *John*. Said deed recited a consideration of $1,500, and contained the follow-

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ing provision: "The right of possession to live on premises aforesaid by said first parties hereby reserved." Said deed was on the same day recorded in the register's office. At the same time the defendant *John* gave back to the plaintiffs a mortgage on said premises in the usual form, reciting, in effect, the consideration of $1,500, purporting to be upon the express condition that if the defendant *John* should pay or cause to be paid said $1,500 as follows: $1,000 to be considered paid at the death of the plaintiffs, and $500 to be paid to the heirs at law of the plaintiffs without interest, according to the condition of one certain note bearing even date therewith, by the defendant *John*,— then the same was to be null and void. In said mortgage the defendant *John* also covenanted and agreed to pay all taxes and assessments of every nature that might be assessed on said premises, and, in case of the failure to pay the $1,500 as mentioned or any taxes so assessed, then that the plaintiffs might enforce payment of the mortgage by grant, bargain, sale, release, and conveyance or otherwise, and out of the moneys arising from the sale pay the principal and interest on said note. Said mortgage was recorded at the time of recording the deed and in the same office.

On August 5, 1891, the plaintiffs commenced this action, and alleged in the complaint the facts stated, and also that the plaintiffs were husband and wife, aged seventy-one years and sixty-six years, respectively; that they were both German, and could neither read, write, speak, or understand the English language; that at the time of making said deed and mortgage there was personal property on said farm, such as stock, farming utensils, etc., of the value of $500; that the land was an improved farm, with house and barn, and the homestead of the plaintiffs, and of the value of $3,000, and all the property of every kind which they possessed; that said papers were so executed and delivered upon an agreement of the defendant *John* that he

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would stay on the farm, and work the same in a good and husbandlike manner, and support and care for the plaintiffs, and each of them, during their natural lives, and give them a decent burial; that no other or further consideration whatever was paid or received by the plaintiffs other than said agreement to support; that no note, bond, or other writing, showing any obligation of the defendant *John*, other than said deed and mortgage, was given; that the plaintiffs had no one to advise with, and supposed and believed all papers necessary to secure them in their rights under said verbal agreement were properly drawn; that the defendant *John* married the defendant *Anna* in the latter part of 1883. That the parties all lived together on the premises until the latter part of 1886, when the defendants abandoned said farm without making any provision whatever for the care and support of the plaintiffs, and have never since furnished any care, support, or assistance of any kind to the plaintiffs; that the plaintiffs contributed largely by their work in producing the income from the farm, and received nothing therefrom except a bare living, the defendant *John* taking all the balance of the income; that the plaintiffs had been compelled to pay most of the taxes, and take care of themselves, and were unable longer to do so by reason of their age. The prayer was that said deed and mortgage be rescinded and canceled of record, and the title and possession of the land be adjudged to be vested absolutely in the plaintiffs, with costs.

The defendants answered, and alleged, among other things, that they had paid the plaintiffs about $1,200, which had been used to help pay for the farm and in the purchase of tools, machinery, and live stock, and had received nothing from the plaintiffs therefor; that they had always been ready and willing to perform all the terms, covenants, and conditions of the deed and mortgage, and all the written agreements and verbal understandings had between them

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and the plaintiffs, relative to the land and personal property, except so far as the plaintiffs, by their own conduct, had prevented the same; that the plaintiffs had an ill feeling towards said *Anna*, and that it had been impossible to remain in peace on the farm.

At the close of the trial the court granted a motion for a nonsuit, and found as matters of fact that the allegations of the complaint were not sustained by the proof, and as conclusions of law that the defendants were entitled to judgment dismissing the complaint, with costs and disbursements, and ordered judgment accordingly. From the judgment entered accordingly the plaintiffs appeal.

The cause was submitted for the appellants on the brief of *Humphrey Pierce*, and for the respondents on that of *John Bottensek*.

CASSODAY, J. The ages of the plaintiffs, respectively, the fact that neither could read, write, or speak the English language, and the value of the real estate and personal property, as alleged in the complaint, were all proved without objection. It was also proved, without objection, that no note was given with the mortgage; that the agreement between the father and son was not reduced to writing at all, except the deed and mortgage; that the son gave his father nothing further for the deed "than the mortgage and his verbal agreement to support" the plaintiffs; that, since the son had left, the plaintiffs had not had any one on the farm to help them; that neither of the plaintiffs was able to do any work upon the farm; and that they had no other property. The court thereupon excluded all evidence as to whether there was any part of the agreement not reduced to writing, or any other consideration for the deed except an oral agreement to support, or as to what that agreement was, or the actual consideration for the deed, or whether the father was to receive anything

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besides the mortgage, or whether the son was to remain upon the farm and support his father and mother during their natural lives and give them a decent burial at their death, or whether the plaintiffs supposed the papers mentioned fully expressed the agreement and consideration for the deed, or that in 1886 the son neglected and refused to furnish any support to the plaintiffs or to observe or carry out such oral agreement. Such parol testimony was excluded on the ground that the whole contract had been reduced to writing, and that such oral evidence tended to contradict, modify, or enlarge the terms of the deed and mortgage, and hence was inadmissible.

The deed and mortgage back, having been executed and delivered at the same time, must be taken together and construed as one instrument in law for the purpose of determining the character of the transaction and the intention of the parties. *Gillmann v. Henry*, 53 Wis. 468; *Herbst v. Lowe*, 65 Wis. 320; *Joy v. St. Louis*, 138 U. S. 38. Being one paper in law, they must either stand or fall together in law. *Morgan v. Loomis*, 78 Wis. 598. By the two instruments, taken together, the plaintiffs in effect conveyed their homestead, of the value of $3,000, to their son, his heirs and assigns forever, by deed reciting a consideration of $1,500, subject to the reservation of the possession of the land for the purpose of living thereon, upon condition that $1,000 of such consideration should be considered paid on their death, and that the other $500, without interest, should be paid to their heirs at law, according to the conditions of a certain note mentioned but never executed. As the heirs at law of the plaintiffs can only be ascertained upon their death, it is obvious that the $500 is not to be paid until after their death. It appears, and is in effect conceded, that no consideration whatever was paid or secured except as mentioned. As indicated, the mortgage states when the $1,000 is to be "*considered* paid," but con-

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tains no agreement to pay the same, and is entirely silent as to the time and manner of making such payment, and is unaccompanied by any written agreement to pay in money, property, support, care, or in any way. Thus it appears that the son obtained $500 worth of personal property, and the conveyance of the homestead of the value of $3,000, without paying any consideration therefor, or agreeing in writing to pay anything therefor, except the $500 as mentioned; and yet it is apparent from the writings executed that the son did make some kind of an agreement, not reduced to writing, respecting the balance of the consideration. In fact it is impliedly admitted in the answer by alleging in effect that the defendants had been ready and willing to perform "all the written agreements and *verbal understandings* . . . relative to said land and personal property, except so far as plaintiffs, by their own conduct, prevented."

The rule is well established that when only a part of an entire agreement is reduced to writing the residue may be proved by extrinsic evidence. *Ballston Spa Bank v. Marine Bank*, 16 Wis. 136; *Jilson v. Gilbert*, 26 Wis. 645; *Nilson v. Morse*, 52 Wis. 240; *Becker v. Knudson*, *ante*, p. 14. So, where the time and manner of paying the consideration for a conveyance is not expressed, or is only partially expressed in the writings, it is competent to prove the same by parol. *Frey v. Vanderhoof*, 15 Wis. 397; *Hannan v. Oxley*, 23 Wis. 519; *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165; *De Forest v. Holum*, 38 Wis. 516; *Kickland v. Menasha W. W. Co.* 68 Wis. 34; *Green v. Batson*, 71 Wis. 54; *Ludeke v. Sutherland*, 87 Ill. 481. Some of these cases go to the extent of holding that parol evidence is admissible to prove an additional consideration to the one recited in the conveyance, though not inconsistent with it. So it has been repeatedly held that a conveyance, though absolute in form, may nevertheless be shown by parol evidence to be nothing more than a

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mortgage or security. We must hold that it was competent to prove by parol the true consideration for the conveyance, and the time and manner in which the same was to be paid. The action seems to be in line with numerous cases in this court, where, as here, the written instruments, taken together, have been held to be a conveyance upon condition resting wholly or partially in parol, and where such conveyance has been set aside for a breach of such condition, and the court has done equity between the parties, especially in favor of aged parents. *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385; *Blake v. Blake*, 56 Wis. 392; *Delong v. Delong*, 56 Wis. 514; *Divan v. Loomis*, 68 Wis. 150; *Stoel v. Flanders*, 68 Wis. 256; *Hartstein v. Hartstein*, 74 Wis. 1; *Dickson v. Field*, 77 Wis. 439; *Morgan v. Loomis*, 78 Wis. 600.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

GILBERT, Appellant, vs. LOBERG and another, Respondents.

January 9—January 30, 1894.

Pleading: Counterclaim: Landlord and tenant: Waste: Conversion: Striking out irrelevant matter.

1. In an action by a landlord against tenants for waste, the defendants may counterclaim for the value of personal property placed by them on the premises during their tenancy, and which the landlord has converted by preventing its removal.
2. A motion to strike out defensive matter is properly denied if any part of the matter so attacked is good.

APPEAL from the Circuit Court for *Shawano* County.

The complaint in this action has been before this court upon demurrer, and is reported in 83 Wis. 189. The first

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count in the complaint states a cause of action by a landlord against his tenants, under ch. 136, R. S., for waste in removing a barn from the demised premises, and claims double damages therefor.

The answer contains a counterclaim for the conversion by plaintiff of an ice box and ice pan which defendants, during their tenancy, placed temporarily in a building on the demised premises, and which it is alleged the plaintiff prevented them from removing. The answer also contains a count by way of defense, which alleges, among other things, that the barn was built by defendants and was not a permanent structure attached to the freehold; that there was a custom in the neighborhood which authorized the removal by the tenants of such a building; and that when it was built it was understood between the parties that it might be removed at the termination of the lease.

Plaintiff demurred to the counterclaim generally and because the facts were not pleadable as a counterclaim. Plaintiff also moved to strike out the alleged defense above stated, as irrelevant, immaterial, and redundant. The demurrer and motion were heard together, and from an order overruling the demurrer and denying the motion plaintiff appeals.

For the appellant the cause was submitted on the brief of *Gerrit T. Thorn.*

For the respondents there was a brief by *M. J. Wallrich*, attorney, and *Spooner, Sanborn & Kerr*, of counsel, and oral argument by *J. B. Kerr.*

WINSLOW, J. The first question is whether, in an action by a landlord against his tenants for waste upon the demised premises, the tenants can counterclaim for the value of personal property which they have placed on the premises during their tenancy, and which the landlord has converted by preventing them from removing it. We think

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this is a proper subject of counterclaim. The statute (R. S. sec. 2656) allows the defendant to plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action." The fact of the tenancy was an essential fact in the plaintiff's cause of action, without which he could not maintain his action of waste. The subsisting lease was, therefore, the transaction which was the very foundation stone of his claim. It is quite plain that the counterclaim is for the violation of a right which also grew out of the relations established by the lease, and thus is a cause of action arising out of the transaction which is the foundation of plaintiff's claim. Such was the ruling in *Vilas v. Mason*, 25 Wis. 310.

As to the motion to strike out the defensive matter, it is settled that the motion must be denied if any part of the matter so attacked is good. *Jarvis v. McBride*, 18 Wis. 316. That part of the answer which alleges that it was understood that the barn might be removed by the tenants is clearly defensive matter in the way of confession and avoidance, and consequently is properly pleadable.

By the Court.— Order affirmed.

MARATHON COUNTY, Appellant, vs. BARNES, Assignee, Respondent.

January 9 — January, 30, 1894.

Voluntary assignment: Collection of taxes on personal property.

1. Taxes assessed to an assignee for the benefit of creditors on account of personal property in his hands as such assignee are entitled to the preference of payment provided by sec. 1698c, S. & B. Ann. Stats.; and under sec. 1700 it is the duty of his successor in the trust to pay them before making any dividend, unless for any reason such taxes are illegal.

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2. An action by a county against an assignee for the benefit of creditors to recover delinquent taxes on personal property and to have them adjudged a preferred claim and to have the assignee ordered to pay them, is essentially an equitable action and cannot be maintained because the relief may be obtained in the assignment proceedings.

APPEAL from the Circuit Court for *Outagamie* County.

This is an action for the recovery of delinquent taxes, and the complaint shows, in substance, that Hoxie & Mellor made a voluntary assignment, pursuant to the statute, of their property, effects, etc., for the benefit of their creditors, to C. V. Bardeen, who qualified and entered upon his duties, and sold and converted into money the greater part of the assigned estate, and to the amount of $40,000. He had kept his office as such assignee at Antigo in the county of Langlade, where the assignment was made, for about four months, and then removed it to Wausau, Marathon county, depositing the sum so realized in divers banks in that city, and kept his office thereafter in said city until he resigned his trust, August 20, 1891, and the defendant, *Barnes*, was appointed and qualified in his place. On the 1st of May, 1891, Bardeen, as such assignee, while having said money on deposit, returned and listed it for taxation, pursuant to the demand of the assessor of Wausau, and this assessment was equalized and approved, and a tax thereon was extended upon the tax roll against Bardeen as such assignee, for that year, amounting to $1,564.20, and was returned to the county treasurer of Marathon county as delinquent. The sheriff, in whose hands the delinquent list was placed for collection, had been unable to collect said tax, and the defendant, assignee of Hoxie & Mellor, neglected and refused to make payment thereof, and the whole sum due, with interest allowed by law, remained unpaid. Judgment was demanded against the defendant, as such assignee, for said sum with interest, and that it be adjudged a preferred

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claim against the assets of Hoxie & Mellor, and that the defendant be ordered and directed to pay it, besides costs, etc.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the plaintiff appealed from an order sustaining the demurrer.

For the appellant there was a brief by *C. F. Eldred*, attorney, and *Mylrea, Marchetti & Bird*, of counsel; and a supplemental brief by *Silverthorn, Hurley, Ryan & Jones;* and the cause was argued orally by *C. B. Bird.* To the point that, although the tax was assessed to Mr. Bardeen as assignee, the action could be maintained against the present assignee, they cited *Enos v. Bemis*, 61 Wis. 656, 659; *Dalby v. People*, 124 Ill. 66. If Bardeen was a necessary party defendant the present demurrer does not raise that objection. R. S. secs. 2649, 2654; *Hallam v. Stiles*, 61 Wis. 270; *Burhop v. Milwaukee*, 18 id. 431, 436; *Baker v. Hawkins*, 29 id. 576; *Yates v. Shepardson*, 39 id. 174.

For the respondent there was a brief by *Raymond, Lamoreux & Park*, and oral argument by *B. B. Park.* They contended that if the complaint states a cause of action it is a cause of action against Bardeen and not against *Barnes. Merrill v. P. B. Champagne L. Co.* 75 Wis. 142; *Williams v. Holden*, 4 Wend. 223–6; *Walton v. Westwood*, 73 Ill. 125; Bigelow, Estoppel (5th ed.), 148; 3 Wait, Act. & Def. 259, art. 2, sec. 13.

PINNEY, J. The assessor is required to place on the assessment roll, "opposite the name of each person liable to assessment on personal property," as provided in the statute, "the valuation of all personal property owned by himself or wife, or which he has in charge or possession as lessee, occupant, agent, mortgagee, pledgee, parent, guardian, executor, administrator, trustee, *assignee*, or receiver,

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which is liable to taxation." S. & B. Ann. Stats. sec. 1044. The tax is to be computed upon and carried out opposite to each such valuation (Id. sec. 1079); and the warrant for its collection to the treasurer requires him "to collect from each of the persons and corporations named therein . . . the taxes set down in such roll opposite to their respective names." Id. sec. 1081. If not collected, a schedule of delinquent taxes on personal property is returned to the county treasurer, giving the names of the persons taxed and the amount and years for which the taxes are due, and he issues a warrant to the sheriff for its collection; and, "in case any of such taxes shall be returned unpaid in whole or in part, the said treasurer may at any time within six years thereafter bring an action or actions in the name of his county to recover such unpaid taxes and the costs and charges thereon, against the persons or corporations *charged therewith*, in any court of competent jurisdiction." Id. sec. 1127.

It was argued that Bardeen, and not the defendant, had been charged with the tax in question, and that the defendant was therefore not liable to the action; but it will be seen that, in view of the statutory provisions about to be referred to, the case does not require a decision of this question. The statute authorizes a legal action, and the pleader has attempted to set out an equitable cause of action, and to obtain equitable relief, upon the ground that the estate and assets of Hoxie & Mellor, in the hands of the defendant as their assignee, are held in trust for the payment of the tax in question, assessed on account of it; and, in addition to demanding judgment for the amount due against the defendant as assignee of Hoxie & Mellor, asks that such sum be adjudged a preferred claim against the assets in the hands of the assignee, and that the defendant, as such assignee, be ordered to pay it, besides costs, etc. Since the enactment of sec. 1127, allowing ac-

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tions to be brought for the recovery of delinquent taxes, it has been provided by sec. 2, ch. 48, Laws of 1885 (S. & B. Ann. Stats. sec. 1693*c*), that "the costs, debts due the United States or the state of Wisconsin, all taxes and assessments levied and unpaid, expenses of the assignment, and executing the trust," shall be first paid; and by subd. 13, sec. 2, ch. 194, Laws of 1879 (S. & B. Ann. Stats. sec. 1700), it is provided that "before making any dividend the assignee shall pay all taxes assessed upon the property assigned which remain unpaid." The tax in question is one levied by reason of the property assigned, and, in a general sense, upon it, and is entitled to the preference of payment provided by sec. 1693*c*. It is the plain duty of the present assignee, under sec. 1700, to pay it before making any dividend, unless for any cause the tax is illegal. These provisions are to be construed liberally for the protection and relief of the assignee, who has no personal interest in the matter, but merely a duty to perform for the benefit of those beneficially interested.

The circuit court, or the judge thereof in vacation, has supervision of the proceedings in all voluntary assignments made under the statute, and may make all necessary orders for the execution of the same. R. S. sec. 1693. Upon a petition on behalf of the plaintiff, stating the material facts and that the assignee refused to make payment of the tax, it would be the duty of the court, or judge in vacation, to direct payment thereof, if the validity of the tax was not questioned and the assignee had funds belonging to the estate to enable him to make such payment. His failure to make payment, having sufficient funds for that purpose, would be a clear breach of his bond, and would render both himself and his sureties liable for the amount. If the validity of the tax is questioned, the court may proceed to try and determine its validity in the same manner as in the case of any other contested claim.

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An independent original action for relief cannot be maintained where it may be obtained on motion or petition in an action or proceeding previously commenced, in which the necessary parties are before the court, or where the claimant may intervene by motion or petition. The cases are numerous on this point, and some of them are referred to in *Stein v. Benedict*, 83 Wis. 610. The reason for the rule is stronger where, as in the present case, the claim relates to or may affect assets or a fund in course of administration in the action or proceeding already instituted. Any other rule would be productive of embarrassment and uncertainty. The present action is, we hold, essentially an equitable one, and the plaintiff can have all the relief it seeks by it in the proceedings in the matter of the assignment of Hoxie & Mellor. There was no necessity, therefore, for instituting the present action, and to sustain it tends to multiplicity of suits and would be productive of unnecessary costs. No reason whatever is suggested why a remedy so plain, direct, and inexpensive has not been resorted to. For this reason the demurrer of the defendant was rightly sustained, but the judgment to be entered thereon must be without prejudice to the right of the plaintiff to proceed by motion or petition, as already indicated.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for further proceedings according to law.

LAMON and others, Respondents, vs. FRITZ, Appellant.

January 10 — January 30, 1894.

Contracts: Interpretation: Evidence.

In an action to recover for making railroad ties under an oral contract, plaintiffs testified that defendant told them to make the ties the same as they had been making them for M., a neighbor. De-

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fendant, in his direct examination, testified that he told one of the plaintiffs he could go to work "on the same terms he was working for M. as to specifications, and that the terms were to be the same as with the ties he was making for M.;" but on cross-examination he said: "I told him to go on and make the ties just the same as he had been for M. That was the words used." *Held*, that the court was justified in assuming that by the contract the ties were to be *made the same* as those of M., and not on the same terms, and in excluding evidence of the terms of the contract with M. in respect to the manner in which the quantity of ties was to be determined, etc.

APPEAL from the Circuit Court for *Chippewa* County.

The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiffs.

L. J. Rusk, for the appellant.

For the respondents there was a brief by *W. H. Stafford* and *Vesper Morgan*, and oral argument by *Mr. Stafford.*

ORTON, C. J. This action, consolidated of two actions, stands now in the names of the three plaintiffs against the defendant, on a contract between them for making 3,480 railroad ties of timber on the defendant's land, at the price of seven cents per tie, and for a lien on said land therefor. The case was tried before the court with a jury, but the following was the only question submitted to the jury, viz.: "How many ties did plaintiffs make for defendant, of the kind contemplated by the parties when the contract was made?" and the jury answered "3,480 ties." This number of ties, at seven cents each, constituted the judgment, exclusive of interest and costs and lien on the land, and the defendant has appealed therefrom. The main questions presented on this appeal are, *first*, What was the language used by the parties in making the contract? and *second*, Is there any ambiguity in the language used that required either the court or jury to put any construction upon it, outside or beyond its plain and obvious meaning?

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The learned counsel of the appellant contends that the language used means that the plaintiffs agreed to cut said ties *on the same terms* as they were cutting ties for another person near by, by the name of Morrissey. On the other hand, the learned counsel of the respondents contends that the language used means that they were to *make* the ties the same as they had been making ties for Morrissey. It is conceded, however, on both sides, that the price was to be seven cents per tie. The testimony of the plaintiffs, as to the language used, was as follows: "Go on and make the ties, and make them the same as we had been making them for Morrissey." The testimony in chief of the defendant, as to the language used, was as follows: "I told him he could go to work any time he wanted to on the same terms he was working for Morrissey as to specifications, and that the terms were to be the same as with the ties he was making for Morrissey." On cross-examination the defendant testified as follows: "I told him to go on and make the ties just the same as he had been for Morrissey. That was the words used." This last testimony of the defendant, and the testimony of the plaintiffs as to the contract, are substantially the same. The language is so plain, even where the testimony differs, that it certainly does not require any special interpretation. By the testimony of the plaintiffs, the ties were to be *made* (or manufactured) *the same* as those of Morrissey; and by the first testimony of the defendant the ties were to be made *on the same terms* as the Morrissey ties. The difference is obvious and material. But the defendant corrected his testimony on cross-examination, so as to agree with the plaintiffs'. The jury found the plaintiffs' version of the contract the true one.

First, then, such was the contract; and, secondly, the jury does not seem to have had any difficulty in understanding what the language meant. The difference be-

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tween *making* ties and the *terms* upon which they are made is quite distinct and material. The first exception taken by the learned counsel of the appellant will clearly and practically show this difference. The plaintiff, as a witness, was asked by defendant's counsel, on cross-examination: "How were you paid by Mr. Morrissey? What was Morrissey's method of determining the amount of the ties? How were the ties you made for Mr. Morrisey to be counted or estimated?" The court sustained the plaintiffs' objections to these questions, and the defendant excepted. The court probably understood that the defendant had finally agreed with the plaintiffs as to the language used in making the contract, and rejected the testimony as to the *terms* of the Morrisey contract; and we think the court was correct in this ruling. The defendant's counsel asked the court to direct a verdict for only 1,740 ties, "according to inspection," at seven cents each. This raised the same question as to whether the plaintiffs' ties should not be first hauled to the railroad, and be there inspected and counted the same as Morrissey's ties. The plaintiffs' ties were counted in the woods as fast as made, and entered in a book; and as to the dimensions of the ties and the kind and quality of the timber the plaintiffs claimed that the defendant knew at the time just how the ties were made, and made no objection to them, and finally ordered the plaintiffs to cut the timber closer or cleaner, which made some of the ties under size for their inspection at the railroad like the Morrissey ties. These were questions for the jury on the evidence. The court properly refused to direct such a verdict.

The other exceptions are to be instructions of the court. If there were any errors in the charge, they are not specifically pointed out any further than by inclosing large portions of the charge within brackets, and all such appear to be unexceptionable. The instructions throughout, if there is

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any difference at all, appear to be very favorable to the defendant.

Lastly, the court did not err in denying the defendant's motion for a new trial. The verdict of the jury and the judgment are clearly supported by the testimony, and appear to be just.

By the Court.—The judgment of the circuit court is affirmed.

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1. In an action of trespass, where the defendant claims title to the *locus in quo*, his title deeds are admissible without proof of seisin or possession within twenty years. Having shown his legal title to the premises, he is presumed, under sec. 4210, R. S., "to have been possessed thereof within the time required by law," and the occupancy of other persons is "deemed to have been under and in subordination to the legal title," unless shown to have been adverse. *Riha v. Pelnar*, 408
2. The grantor of land is estopped from claiming that his possession after the conveyance was adverse to his grantee. *Ibid.*
3. The grantor of land continuing in possession after the conveyance cannot set up adverse possession against his grantee, but holds as tenant for the latter until he explicitly disclaims such relation. *McCormick v. Herndon*, 449

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3. An order denying a motion for judgment on the minutes and special verdict, not followed by judgment for the opposite party, affects a substantial right and is appealable. *Murphey v. Weil*, 643

Notice of appeal.

4. Under sec. 3049, R. S., a notice of appeal not directed to or served "on the clerk of the court in which the . . . order appealed from is entered," is a mere nullity. *North Hudson M. B. & L. Asso. v. Childs*, 292

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7. A finding of fact by the trial court will be regarded in all respects as a verity, as against a respondent who took no exception thereto. *Miller v. Tracy,* 330

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8. A fact admitted in open court on the trial is one of the facts in the case, as much as the finding of a special verdict. *Murphey v. Weil,* 643

9. Upon an appeal from an order granting a new trial on the ground that the findings of the special verdict were inconsistent, the bill of exceptions contained only the special verdict, although respondent had asked the insertion therein of an admission of an important fact, made on the trial. On respondent's motion the record is returned to the trial court, in order that motion may there be made for correction of the bill of exceptions. *Ibid.*

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10. A verdict will not be disturbed because the trial judge made an error of ten cents in stating to the jury the amount which plaintiff should recover in case certain facts were found. *Warden v. Sweeney,* 161

11. The exclusion of admissible evidence which could not have changed the result is not a material error. *Hoffman v. Joachim,* 188

12. Where an action is upon an account and also upon a note given for a part thereof, and the note is brought into court, the defendants are not prejudiced by the fact that the findings and judgment rest upon the account rather than the note, especially where no interest was allowed. *Spaulding v. Stubbings,* 255

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1. One who kicked another is liable for an injury of which such kick was the exciting cause and which was its natural consequence, although the physical condition of the person kicked may have aggravated the injury. *Vosburg v. Putney*, 278
2. The question as to what was the exciting cause of an injury following a kick on the leg of a person, is a proper subject for expert testimony. *Ibid.*
3. Defendant having testified that he touched plaintiff's son with his foot, a statement in the charge to the jury that he kicked him is not ground for a reversal. *Ibid.*

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1. Where the affidavit for an attachment upon a demand not yet due states, as required by statute, that the debt is *to become due*, the writ is not invalidated by an unnecessary recital therein to the effect that it "appears from said affidavit that the whole amount *due* the said plaintiffs" is a certain sum. *Spitz v. Mohr*, 387
2. The affidavit for an attachment, made by one of the plaintiffs, states that the defendants (naming them) are indebted to the plaintiffs, etc., and that the affiant has good reason to believe, etc., "that *the parties aforesaid* have assigned," etc., their property with intent to defraud their creditors. *Held*, that "the parties aforesaid" refers to the defendants specifically named, and that the affidavit is a sufficient compliance with the statute requiring it to state "that *the defendants* have assigned," etc. *Ibid.*

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1. When the fact that an action is being prosecuted under a champertous agreement comes to the knowledge of the court in any proper manner, the action will be dismissed. *Barker v. Barker*, 14 Wis. 131, adhered to. *Kelly v. Kelly*, 170
2. A contract between attorney and client by which the attorney agrees, in consideration of $1, to prosecute an action and pay all costs, expenses, and counsel fees therein, and the client agrees that if awarded judgment she will pay him a certain share of the proceeds of the land recovered, but, if unsuccessful, said sum of $1 shall be full consideration for the attorney's services and counsel fees, is champertous. *Ibid.*
3. An attorney prosecuting an action under a champertous agreement cannot, in his client's absence, cancel such agreement and proceed with the action, even though he has a letter of attorney authorizing him to sue and do all things necessary in that behalf. *Ibid.*

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4. If counsel pursue an improper line of argument to the jury, exception thereto should be taken and a ruling had thereon at the time, so that the error, if any, may appear from the record. *Laue v. Madison*, 453

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18. *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444 (as to direction of writ of *certiorari*), distinguished. *State ex rel. Tibbits v. Milwaukee*, 377

19. *North Hudson M. B. & L. Asso. v. Childs*, 82 Wis. 460 (as to character of action), adhered to. *Same Case*, 293, 297

20. *Poposkey v. Munkwitz*, 68 Wis. 331 (as to damages), distinguished. *Pewaukee M. Co. v. Howitt*, 270, 276

21. *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659; *Whalen v. C. & N. W. R. Co.* 75 id. 654 (as to negligence of person injured on track), distinguished. *Johnson v. Lake Superior T. & T. Co.* 73

22. *Smith v. Lockwood*, 34 Wis. 72. See No. 2.

23. *Stein v. Benedict*, 83 Wis. 603 (as to bringing in new parties), distinguished. *Taylor v. Matteson*, 127

24. *Trustees v. Kilbourn*, 74 Wis. 452; *Mackey v. Michelstetter*, 77 id. 210 (as to demurrer and adequacy of remedy at law), distinguished. *Pierstoff v. Jorges*, 136

25. *Way v. Way*, 67 Wis. 662. See No. 7.

26. *Whalen v. C. & N. W. R. Co.* 75 Wis. 654. See No. 31.

CAUSE OF ACTION. See ACTION. TRIAL, PLACE OF, 1.

CERTAINTY in pleading. See TRESPASS.

CERTIFICATE of election. See OFFICERS, 1.

CERTIORARI.

See COSTS, 1.

1. Where the common council of a city is a continuing body and has the control of all its records, while the city clerk having the custody thereof is a mere ministerial officer, a writ of *certiorari* to review proceedings of the council should be directed to that body, and not to the clerk or to the city itself. *State ex rel. Tibbits v. Milwaukee*, 376

2. Where a writ of *certiorari* has been misdirected it may be superseded before, as well as after, its return. *Ibid.*

CHAMPERTY. See ATTORNEYS, 1-3.

CHANGE OF VENUE.

See REMOVAL OF CAUSES. TRIAL, PLACE OF.

1. An order directing a change of the place of trial, under subd. 3, sec. 2622, R. S., on the ground that the convenience of witnesses and the ends of justice will be promoted thereby, will not be reversed except for a manifest abuse of discretion. *Challoner v. Boyington*, 217

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2. Where such an order is granted in a case which has once been tried, and the "records and files" upon which it was granted are not before this court, and it does not appear what facts were within the knowledge and observation of the trial judge, this court cannot hold that there was an abuse of discretion. *Ibid.*

3. Upon an application for such a change, the convenience of parties who are witnesses may be considered to the same extent as that of other witnesses. *Ibid.*

4. Upon an application for a change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted thereby, no procedure being prescribed by statute or rule, it is sufficient if the judge or court is satisfied by proof of some sort that a good cause for the change exists. *Postel v. Weinhagen,* 303

5. Where a change has been granted on that ground, this court will not reverse the order unless there has been a clear abuse of discretion. *Ibid.*

6. Where a defendant corporation had the absolute right to have the place of trial changed to the county in which said corporation was located, plaintiff's opposition to such change on the ground that the convenience of witnesses and the ends of justice would be promoted by retaining the cause in the county in which it was brought, and his final consent to the change, did not constitute a waiver of his right to have the venue changed back to the original county on said ground, if the court of the county to which the first change was made should in its discretion so order. *Maher v. Davis & Starr L. Co.* 530

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES.

See GARNISHMENT, 1.

1. A father purchased personal property and immediately leased it to his son, who had been present and had selected the property when the purchase was made. The son took possession under the lease, and while so in possession mortgaged the property to persons who had given him credit on the faith of his ownership thereof. Afterwards the father took possession, terminating the lease, as by its terms he was authorized to do. In replevin by the mortgagees against the father, it is *held* that the son had no right to give the mortgage, and that the father, not having said or done anything to mislead the mortgagees or induce them to give credit to the son, was not estopped to claim the property. *Neubauer v. Gabriel,* 200

2. Assuming that the mortgage operated as an assignment of the son's interest in the lease, yet the mortgagees took subject to the terms of the lease and were thereby estopped to deny the lessor's title. *Ibid.*

CITIES. See CERTIORARI, 1. MUNICIPAL CORPORATIONS. PUBLIC LANDS. SCHOOLS, 4.

CO-EMPLOYEES. See STREET RAILWAYS, 5.

COLLUSION. See DEBTOR AND CREDITOR, 5, 6.

COMMON CARRIERS. See RAILROADS, 8, 9.

COMMON SCHOOLS. See SCHOOLS.

COMPETENCY of testator. See WILLS, 2.

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COMPLAINT. See ACTION, 2. DEATH, 1. DEBTOR AND CREDITOR, 5, 6. ESTATES OF DECEDENTS, 2. EVIDENCE, 1, 2. FALSE REPRESENTATIONS, 2. HIGHWAYS, 6. INSURANCE, 8. JUDGMENT, 3. LIBEL, 3. PLEADING, 1, 2, 4, 5, 10, 11. RAILROADS, 6, 15. STREET RAILWAYS, 3, 5. TRESPASS.

CONDEMNATION OF LAND. See RAILROADS, 1–3.

CONFLICT OF LAWS. See JUDGMENT, 4. REMOVAL OF CAUSES.

CONSIDERATION. See DEEDS, 3, 7, 8. INSURANCE, 8. MORTGAGES, 4, 5. NEGOTIABLE INSTRUMENTS. SURETYSHIP, 2. WITNESSES.

CONSPIRACY. See CRIMINAL LAW, 3.

CONSTITUTIONAL LAW. See JUDGMENT, 4. TAXATION, 2.

CONTRACTS.

See ATTORNEYS, 1–3. CHATTEL MORTGAGES. CORPORATIONS. COUNTIES. DEEDS. ESTATES OF DECEDENTS, 1. GARNISHMENT, 2. INFANTS. INSURANCE. LANDLORD AND TENANT. MARRIAGE. MARRIED WOMEN. MASTER AND SERVANT, 14. MORTGAGES, 1, 2. NEGOTIABLE INSTRUMENTS. PARTNERSHIP. RAILROADS, 9. SALE OF CHATTELS. SUNDAY. SURETYSHIP. TRIAL, PLACE OF, 2. VENDOR AND PURCHASER. VOLUNTARY ASSIGNMENT. WITNESSES.

1. Defendant having agreed in writing to pay plaintiff a certain amount for drawing lumber to defendant's yard, to furnish a wagon for such purpose, and to pay twenty-five cents additional for each 1,000 feet if the whole quantity should be delivered in a specified time, plaintiff was entitled to recover the additional pay, although he did not complete the delivery in the specified time, if the delay was caused by defendant's refusal to furnish the wagon or failure to furnish the requisite facilities for unloading the lumber in the yard. *Maher v. Davis & Starr L. Co.* 530

2. In an action to recover for making railroad ties under an oral contract, plaintiffs testified that defendant told them to make the ties the same as they had been making them for M., a neighbor. Defendant, in his direct examination, testified that he told one of the plaintiffs he could go to work "on the same terms he was working for M. as to specifications, and that the terms were to be the same as with the ties he was making for M.;" but on cross-examination he said: "I told him to go on and make the ties just the same as he had been for M. That was the words used." *Held*, that the court was justified in assuming that by the contract the ties were to be *made the same* as those of M., and not on the same terms, and in excluding evidence of the terms of the contract with M. in respect to the manner in which the quantity of ties was to be determined, etc. *Lamon v. Fritz*, 668

CONTRIBUTION. See SURETYSHIP.

CONTRIBUTORY NEGLIGENCE. See MUNICIPAL CORPORATIONS, 2, 3. RAILROADS, 7, 11–14.

CONVERSION. See LANDLORD AND TENANT, 6.

CONVEYANCES. See ADVERSE POSSESSION, 2, 3. DEBTOR AND CREDITOR. DEEDS. RAILROADS, 4. TAX TITLES. VENDOR AND PURCHASER.

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CORPORATIONS.

See ACTION, 2. CHANGE OF VENUE, 6. EJECTMENT. GUARDIAN AND WARD, 1, 2. INSURANCE, 17. LANDLORD AND TENANT, 1. LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS. SCHOOLS, 1.

1. Stockholders in a corporation having by a written contract severally agreed to indemnify such stockholders as were or should become liable upon the paper of the company as indorsers, each to contribute in proportion to the stock held by him, it is immaterial, in an action upon such contract against one who executed it unconditionally, that other parties signed it upon condition that it should be binding on them only if signed by all who were named therein. *Taylor v. Matteson*, 113
2. The fact that the plaintiff in such action had received an increase in his salary as president of the company, as a consideration for indorsing paper of the company, does not preclude him from resorting to the contract of indemnity. *Ibid.*
3. The fact that plaintiff as president issued, and personally indorsed, notes of the company beyond the limit fixed in the contract of indemnity, without authority from the corporation, and that the assets of the corporation were by its authority applied to the payment of the notes issued in excess of said limit instead of the notes within the terms of the contract of indemnity, at a time when the corporation was in fact insolvent, is not a defense to an action on the contract, since the corporation, whether solvent or not, had the power to ratify and to pay the notes so given by plaintiff, and defendant, not being a creditor of the corporation, could not be heard to question its action in that behalf. *Ibid.*
4. In an action at law upon the contract of indemnity defendant could not set up a counterclaim for an accounting by plaintiff as to unauthorized or improper acts done by him as president of the corporation, because the right of action in respect thereto, if any, is in the corporation, and it is a necessary party to the litigation thereof, but is not a necessary party to the litigation of plaintiff's demand. *Ibid.*

COSTS.

See APPEAL, 1, 14. JUDGMENT, 1. NEW TRIAL, 2, 3, 5.

1. Where, upon a writ of *certiorari* directed to a city clerk, an assessment of certain property for taxation was held unlawful, costs were properly awarded against the clerk. *State ex rel. Holt L. Co. v. Bellew*, 189
2. Defendants having appealed from the taxation of costs by the clerk, plaintiff offered to deduct the sum claimed as excessive if defendants would withdraw their appeal without costs of motion, but defendants declined to do so. The court, having found that a smaller sum should be deducted, refused costs of motion. *Held*, not an abuse of discretion. *Stubbings v. McGregor*, 248

COUNSEL to defend: Appointment. See CRIMINAL LAW, 1.

COUNTERCLAIM. See CORPORATIONS, 4. EJECTMENT. LANDLORD AND TENANT, 6. PARTNERSHIP, 4–8.

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COUNTIES.

See CRIMINAL LAW, 1. VOLUNTARY ASSIGNMENT, 7.

In an action against a county to set aside certain taxes, two items of which were to pay indebtedness of a town, there was a judgment setting aside said items and sustaining the others, and giving costs against the county. The county appealed from the part of the judgment against it, and the plaintiffs also appealed. The county board authorized said town to employ an attorney to take entire charge of the cause in the supreme court. The town did so, and paid his fees and disbursements. *Held*, that the county was the real party in interest in the action; that it had power to employ, or to authorize the town to employ for it, counsel to attend to the cause in the supreme court; and that it was liable to reimburse the town for said expenditures. Sec. 752, R. S. (requiring the district attorney to prosecute or defend all actions in which the county is interested or a party, "in the circuit court"), is not applicable. *Eagle River v. Oneida Co.* 266

COURT AND JURY. See INSTRUCTIONS TO JURY. RAILROADS, 8, 11.

COURTS. See DEBTOR AND CREDITOR, 7. MANDAMUS, 1. REMOVAL OF CAUSES. SUPREME COURT.

COVENANTS. See DEEDS, 1, 2. LANDLORD AND TENANT, 1–4. VENDOR AND PURCHASER, 4.

CREDITORS' ACTIONS. See DEBTOR AND CREDITOR.

CRIMINAL LAW AND PRACTICE.

See JUSTICES' COURTS.

1. The defendant in a criminal case may have whatever counsel he chooses to retain, and may refuse the services of any other: but if he would be defended at the expense of the county he must accept the services of any reputable attorney whom the court, in its discretion, may see fit to appoint. *Baker v. State*, 474

2. In a criminal case, the court having repeatedly charged the jury that, to justify a conviction, "no mere weight of evidence is sufficient unless it excludes all reasonable doubt," and that "the proof of guilt must be inconsistent with any other rational supposition," it was not error to refuse to give an instruction to the effect that the defendants should not be convicted upon mere suspicion, especially as there was abundant undisputed evidence in the case tending to prove the guilt of all the defendants. *Murphy v. State*, 626

3. Defendants were vagrants and tramps, punishable under secs. 1543–1546, R. S., and sec. 1547*d*, S. & B. Ann. Stats., and had confederated together to continue their criminal career as such. Acting together as confederates they attempted to steal passage on a railway train, and refused to pay fare thereon. After being ejected from the train they continued together until late at night, when, being substantially together and acting in concert, three of them stole some chickens. An hour or two later a store about eighty rods distant was burglarized. After the store was robbed they remained substantially together, wandering through the country, until the next evening, when they were arrested in another county, and part of the property stolen from the store was found on one of them.

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When arrested they were sitting around a fire which they had lighted close to a railway track, and one of them was armed with a revolver. The carrying of the revolver, and probably also the building of the fire, was a criminal offense, in the commission of which they were all confederates. In an action against them for the burglary of the store, the above facts, being conclusively proven, are *held* to establish a conspiracy and confederacy between them to commit crimes of the same nature during the night the burglary was committed, and to justify an instruction that the fact that a part of the stolen property was in the possession of one of them might be considered in determining the guilt of the others. *Ibid.*

CUSTOM. See MASTER AND SERVANT, 2, 14. SALE OF CHATTELS, 7.

DAMAGES.

See ASSAULT AND BATTERY, 1. DEATH. FALSE IMPRISONMENT. LANDLORD AND TENANT, 2–5.

In an action for personal injuries it was error to instruct the jury that they might allow reasonable compensation for the *inconvenience* as well as for the injury suffered by the plaintiff. *Jenson v. C., St. P., M. & O. R. Co.* 589

DEATH BY WRONGFUL ACT.

See ACTION, 1. MASTER AND SERVANT, 3, 10.

1. In an action under secs. 4255, 4256, R. S., to recover damages for the death of plaintiff's intestate, who left no widow and whose children are none of them alleged to be infants, the complaint is *held* defective in not showing that there were any persons to whom pecuniary injury resulted from such death. *Topping v. St. Lawrence,* 526
2. In an action to recover damages for the death of a boy sixteen years old, evidence as to the pecuniary circumstances of his mother, a widow, and the number of her children, was admissible; and the jury in such case might take into account her reasonable expectation of pecuniary benefit from the continuance of his life, even beyond his majority. *Thompson v. Johnston Bros. Co.* 576
3. An award of $1,700 in such a case is *held* not excessive. *Ibid.*

DEATH of party. See INSURANCE, 12.

DEBTOR AND CREDITOR.

See APPEAL, 12. ATTACHMENT. CHATTEL MORTGAGES. GARNISHMENT. RECEIVERS. SURETYSHIP. TENDER. VOLUNTARY ASSIGNMENT.

1. A judgment debtor having fraudulently transferred book accounts and other personal property, and the fraudulent vendee having collected and appropriated to his own use moneys upon said accounts and from a sale of a part of the other property, the judgment creditor may, after the return of an execution unsatisfied, maintain an equitable action under sec. 3029, R. S., even though a part of the property is still in the possession of the fraudulent vendee and might be levied upon. *Pierstoff v. Jorges,* 128

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2. A creditor's action under sec. 3029, R. S., may be maintained although plaintiff's judgment is one recovered by her in bastardy proceedings against the father of her child. The equitable powers of the court will be exercised in such action to enforce and make effectual the remedy given to the mother by the statute in relation to bastardy. *Ibid.*

3. In such action the plaintiff may attack the validity of conveyances made by the defendant prior to the recovery of the judgment in the bastardy proceedings, on the ground that they were made with intent to hinder, delay, and defraud her in the collection of any judgment which she might recover in said proceedings. *Ibid.*

4. A mere creditor at large is not entitled to have conveyances of the debtor's property set aside as fraudulent; nor can the alleged fraudulent grantees be made parties in his action against the debtor (even though such action is an equitable one) merely for the purpose of restraining them from disposing of said property. *North Hudson M. B. & L. Asso. v. Childs,* 292

5. In a creditors' action under sec. 3029, R. S., the failure of the complaint to contain, in form, the averments in respect to collusion specified in Circuit Court Rule XXVIII, sec. 1, is not ground of demurrer. *Faber v. Matz,* 370

6. It is a sufficient compliance with said rule if the complaint states facts from which the lack of collusion, etc., are apparent. *Ibid.*

7. The circuit court for Milwaukee county may entertain an action in the nature of a creditors' bill upon a judgment of the superior court of that county, to enforce satisfaction thereof out of property fraudulently conveyed by the judgment debtor. *Ibid.*

8. The pendency of proceedings supplementary to execution on a judgment is not a bar to a creditors' action to reach property fraudulently conveyed by the judgment debtor to a third person. *Ibid.*

9. The judgment on the debt is conclusive in the creditors' action as to the validity and justice of the plaintiff's claim. *Ibid.*

10. Voluntary conveyances by a judgment debtor to a third person of substantially all her property not exempt from execution, upon a trust and benefit reserved to her, are fraudulent as a matter of law. *Ibid.*

DECEIT. See FALSE REPRESENTATIONS.

DEEDS.

See ADVERSE POSSESSION. MORTGAGES, 1, 2. RAILROADS, 4. TAX TITLES. VENDOR AND PURCHASER, 4.

1. After the execution and delivery of a conveyance of land the grantee retained the entire consideration under an agreement that he would apply it to the payment of existing incumbrances, against which there was a covenant in the deed. Afterwards, upon a settlement between the parties, the grantee represented that he had paid a certain incumbrance, and took credit therefor, though he had not in fact paid it. *Held,* that he was estopped thereafter to claim a breach of the covenant by reason of said incumbrance. *Becker v. Knudson,* 14

2. Parol evidence of the above facts did not tend to contradict or vary the effect of the deed or covenant. *Ibid.*

3. Parol evidence is admissible to show in what manner the consideration named in a deed is to be paid. *Ibid.*

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4. A deed will not relate back to the date of a contract for the sale of the land so as to prevent the vendor, who retained possession until delivery of the deed, from maintaining replevin against a mere trespasser who wrongfully cut and removed timber from the land after the date of the contract but before the consideration was paid or the deed delivered. *Stahl v. Lynn,* 75

5. In ejectment the complaint described the land as lots 194, 196, and 198, West Sixth street, in the city of Superior, and upon the town site of Superior as said town site has been surveyed and platted and the plat thereof recorded. A tax deed, dated in 1866, upon which plaintiff's title rested, purported to convey "West Sixth street, lots 194, 196, 198, in the town of Superior." *Held,* that although judicial notice could be taken of the fact that the territory of the town is now embraced in the city, yet the description in the deed did not, by itself, show that it referred to the land in suit. That description could, however, be aided by extrinsic evidence. *Ritchie v. Catlin,* 109

6. Upon an issue involving title to land, the testimony of one under whom both parties claim, that when he signed the deed of the premises to defendant's grantor he could not read English and supposed that it described a different parcel of land, is not admissible, where there was no claim that the mistake was mutual or that the grantee in such deed knew of the mistake or was guilty of any fraud. *Riha v. Pelnar,* 408

7. A written contract of sale and the deed given in execution thereof described specifically two government subdivisions of land and stated the consideration as a gross sum, without mention of the number of acres sold or of any price per acre. *Held,* that in the absence of fraud or mistake parol evidence was inadmissible to show that the agreement was for the sale of a certain number of acres or for a certain price per acre. *Ohlert v. Alderson,* 433

8. A conveyance of their homestead by parents to their son, and a mortgage back, showed that the only consideration which he agreed in writing to pay was wholly inadequate, and that he had made some kind of an oral agreement as to the balance of the consideration. In an action by the parents for a cancellation of the deed, it is *held* that the true consideration and the time and manner in which it was to be paid might be shown by parol. *Beckman v. Beckman,* 655

DE FACTO OFFICERS. See OFFICERS, 1, 2. PROHIBITION.

DEFAULT. See JUDGMENT, 5, 6.

DEFICIENCY, Judgment for. See APPEAL, 2. MARRIED WOMEN.

DEFINITIONS. See WORDS AND PHRASES.

DELAY in completing contract. See CONTRACTS, 1.

DELIVERY.
Of books and papers. See OFFICERS, 3.
Of summons, etc., outside of state. See SERVICE OF SUMMONS.

DEMURRER. See DEATH, 1. INSURANCE, 8. JUDGMENT, 3. PARTNERSHIP, 8. PLEADING, 3–5, 10, 11.

DEPOSITIONS. See EVIDENCE, 1–3, 8.

DESCRIPTION of land. See DEEDS, 5–7.

DISAFFIRMANCE of contract. See INFANTS.

DISCOVERY. See DEBTOR AND CREDITOR. EVIDENCE, 1–3.

DISCRETION. See ATTORNEYS, 5. CHANGE OF VENUE, 1, 2, 5, 6. COSTS, 2. EVIDENCE, 10. INSURANCE, 12. NEW TRIAL, 1, 5. RECEIVERS, 1.

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DISSOLUTION. See PARTNERSHIP, 3, 4.

DISTRIBUTION of assets. See VOLUNTARY ASSIGNMENT, 5.

DISTRICT ATTORNEY. See COUNTIES.

DITCHES. See DRAINS.

DIVORCE. See MARRIAGE.

DOCKET ENTRIES of adjournments. See JUSTICES' COURTS.

DRAINS.

1. Under sec. 1359, S. & B. Ann. Stats., the town supervisors before proceeding to lay out and establish a ditch must determine that in their judgment it is demanded by, or will conduce to, the public health or welfare. Such a determination is essential to their jurisdiction, and unless it appears on the face of their proceedings their order laying out and establishing the ditch is void. *State ex rel. Witte v. Curtis.* 140

2. Sec. 1388, R. S. (making the order of the supervisors "presumptive evidence of the facts therein stated, and of the regularity of all the proceedings prior to the making of such order"), does not create a presumption of jurisdiction or supply jurisdictional defects in the order. *Ibid.*

EJECTION of boy from street car. See STREET RAILWAYS, 3-5.

EJECTMENT.

See PARTNERSHIP, 5-8.

In ejectment against a corporation a proposed amended answer alleged that the lands had belonged to a firm consisting of plaintiff's ancestor and another, and had been left in the hands of the latter as surviving partner, as personalty subject to the firm debts, which were large; that in the settlement of the partnership affairs and for the continuance of the business said survivor had caused the defendant corporation to be organized, and had conveyed the lands to it in consideration of the payment of the firm debts, which it assumed. The judgment demanded was that plaintiffs take nothing by the action. *Held*, that the proposed answer was defective under sec. 3078, R. S., because stating an equitable defense without demanding, by way of counterclaim, a confirmation of the legal title in defendant, and that the court properly refused to allow it to be filed. [WINSLOW, J., is of the opinion that the allegations of the answer are insufficient to constitute either a defense or a counterclaim.] *Weld v. Johnson Mfg. Co.* 549

ELECTIONS. See OFFICERS.

EMINENT DOMAIN. See RAILROADS, 1-3, 5.

ENCROACHMENTS. See MUNICIPAL CORPORATIONS, 6.

EQUITY. See ACTION, 2. DEBTOR AND CREDITOR. DEEDS, 4, 8. EJECTMENT. INFANTS, 3. MORTGAGES. PARTNERSHIP, 5-7. PLEADING, 3. RECEIVERS. SURETYSHIP. VENDOR AND PURCHASER, 1-4. VOLUNTARY ASSIGNMENT, 7. WILLS, 1.

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ESTATES OF DECEDENTS.

See ACTION, 1. INSURANCE, 12. JUDGMENT, 4. WILLS.

1. Where an attorney has rendered services and made disbursements in defeating a claim against the estate of a decedent in the belief that he was employed for that purpose by the administrator, when in fact their minds never met as to such employment, the administrator, having taken the benefit of such services and disbursements, may be held personally liable for their value upon an implied assumpsit, especially where he has assets of the estate out of which to indemnify himself. *Miller v. Tracy*, 330

2. In an action by an administrator upon a cause of action which accrued to his intestate and her estate, the complaint by mistake alleged that defendant was indebted to "plaintiff" for services performed by "plaintiff" in storing logs in the booms of "plaintiff." The mistake was apparent, and defendant was not misled but answered the complaint as it was obviously meant. *Held*, that the mistake should have been disregarded on the trial or corrected as of course and without terms or delay. *Chandos v. Edwards*, 493

ESTIMATE of lumber. See SALE OF CHATTELS, 2–5.

ESTOPPEL. See ADVERSE POSSESSION, 2, 3. CHATTEL MORTGAGES. DEEDS, 1, 2. RAILROADS, 3. TAXATION, 3.

EVIDENCE.

See ADVERSE POSSESSION, 1. APPEAL, 11. ASSAULT AND BATTERY, 2. CONTRACTS, 2. DEATH, 2. DEEDS, 2, 3, 5–8. INSURANCE, 5–7. MASTER AND SERVANT, 4, 14. MORTGAGES, 1. PUBLIC LANDS, 1.

1. In an action by the state against a former state treasurer and the sureties on his official bond to recover interest alleged to have been received by him on state funds deposited in banks, an examination of the defendants, under sec. 4096, S. & B. Ann. Stats., for the purpose of enabling the plaintiff to frame its complaint, was properly allowed upon an affidavit showing that, while plaintiff knew the aggregate amount of moneys deposited in banks during each quarter of the treasurer's term of office, it did not know the banks where it was deposited, the rates of interest received thereon, the dates of the deposits, the duration or terms of the deposits, the amounts received therefor by the treasurer, nor the proportion of such deposits which properly belonged to the general fund and to the various trust funds in the custody of the treasurer. *State v. Baetz*, 29

2. The sureties, being parties to the action, cannot be relieved from an examination. *Ibid.*

3. That clause of sec. 4096, R. S., which provides that "the party examining shall, in all cases, be allowed to examine upon oral interrogatories," applies to every examination under that section, whether before or after issued joined, or within or without the state. *Neeves v. Gregory*, 319

4. The defendant in an action for the conversion of a horse cannot be impeached, or his testimony contradicted, by the minutes of his testimony on a prosecution of plaintiff for stealing the horse. *Cohn v. Heimbauch*, 176

5. A witness cannot be impeached by asking him if he had not "once before" testified differently. *Ibid.*

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6. A party cannot manufacture testimony for himself by proving what he said at some former time. *Ibid.*

7. Where a husband is offered as a witness on behalf of his wife, the matter, if any, upon which he is a competent witness should be stated in the offer. *Hoffman v. Joachim,* 188

8. Where the deposition of a party as a witness in his own behalf is taken without the state on commission and written interrogatories, the adverse party cannot cross-examine him orally. *Neeves v. Gregory,* 319

9. Evidence is not admissible to contradict a solemn admission previously made on the trial by the party offering it, and which has not been withdrawn. *Riha v. Pelnar,* 408

10. After a case is closed, the matter of reopening it for further proof rests in the sound discretion of the trial court. *Ibid.*

EXAMINATION of party. See EVIDENCE, 1–3.

EXCEPTIONS. See ATTORNEYS, 4.

EXECUTIONS.
Supplementary proceedings. See DEBTOR AND CREDITOR.
How pleaded. See PLEADING, 2.

EXECUTORS AND ADMINISTRATORS. See ACTION, 1. ESTATES OF DECEDENTS. INSURANCE, 12. WILLS.

EXPERT TESTIMONY. See ASSAULT AND BATTERY, 2.

FALSE IMPRISONMENT.

An award of $250 damages for a false imprisonment of two days is *held* not excessive. *Brosde v. Sanderson,* 368

FALSE REPRESENTATIONS.

See VENDOR AND PURCHASER, 3.

1. False representations which were not relied upon are not actionable. *Fowler v. McCann,* 427

2. The complaint alleged that plaintiff's husband wished to buy a kind and gentle road horse for her; that defendant offered him a horse and warranted to the plaintiff that such horse was kind and gentle and free from any tricks and bad habits and was perfectly safe for a lady to drive, and invited her to get into his buggy and drive the horse; that plaintiff, relying on said representations and warranty, got into the buggy to try the horse, and after driving a short distance attempted to turn around, when the horse plunged and reared and upset the buggy, injuring plaintiff; and that in truth the horse was an ugly and vicious animal. *Held,* that the action was in tort, and that it was not necessary to allege or prove that defendant knew the falsity of said representations and warranty. *Cameron v. Mount,* 477

FEES. See WITNESSES.

FELLOW-SERVANTS. See STREET RAILWAYS, 5.

FENCES. See RAILROADS, 7.

FIRE INSURANCE. See INSURANCE, 8–20.

FIRES caused by negligence. See RAILROADS, 18.

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FORECLOSURE of mortgages. See APPEAL, 2. MARRIED WOMEN. MORTGAGES, 3-5. RECEIVERS.

FOREIGN CORPORATIONS. See LIMITATION OF ACTIONS, 1.

FOREIGN JUDGMENTS. See JUDGMENT, 4.

FORFEITURE. See INSURANCE, 14-17, 20. VENDOR AND PURCHASER, 6.

FRAUD. See ACTION, 2. CHATTEL MORTGAGES. DEBTOR AND CREDITOR. INFANTS. INSURANCE, 1, 19. NEGOTIABLE INSTRUMENTS, 1. TAX TITLES, 2. VENDOR AND PURCHASER, 3. VERDICT.

FRAUDS, STATUTE OF. See VENDOR AND PURCHASER, 2.

FRAUDULENT CONVEYANCES. See DEBTOR AND CREDITOR.

FREE HIGH SCHOOLS. See SCHOOLS.

GARNISHMENT.

See JUDGMENT, 5, 6.

1. Under sec. 2768, R. S., a garnishee cannot be held liable for property of which he had taken possession under a chattel mortgage given by the defendant, but which had passed out of his possession and control prior to the service of the garnishee summons upon him; and it is immaterial whether the mortgage was valid or invalid, or the possession so taken was lawful or unlawful, as against the defendant's other creditors. *Spitz v. Tripp,* 25
2. A railway company may withhold so much of the amount due to a contractor as it may become liable to pay to his laborers under sec. 1815, S. & B. Ann. Stats., and cannot be deprived of such right either by the contractor or by garnishment in a suit against him. As garnishee of the contractor it can be held liable for so much only as shall remain due to him after the determination of its contingent liability to his laborers. *Vollmer v. C. & N. W. R. Co.* 305

GUARANTY. See SURETYSHIP.

GUARDIAN AND WARD.

1. A married woman having procured insurance upon the life of her husband "for the sole use of" herself and his children, and the company, after his death, having voluntarily paid the amount to her and the guardian of the children, the question whether the company, under its charter and the law as it then existed, had the power to issue to a married woman a policy other than one payable to herself alone in case she survived her husband, is immaterial in a proceeding on behalf of the children to compel the guardian to account for the money so received by him. *Taylor v. Hill,* 99
2. The policy in such case having in terms provided that the insurance should be paid to the widow *and children,* and having received a practical construction accordingly by all parties, the court will not consider, in the proceeding against the guardian, whether, construing together the policy and the charter of the company, the insurance was not payable to the widow alone. *Ibid.*
3. There having been no designation in the policy of any inequality in the shares which the widow and children should receive, they were all entitled to share equally. *Ibid.*
4. Although the guardian had in good faith turned over the whole of the insurance money to the widow, he was bound to account to his

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wards for their shares thereof; and he was not entitled to be credited with their support furnished gratuitously by the widow, their mother, with no intention of charging therefor. *Ibid.*

5. Neither the statute of limitations nor any bar in analogy thereto — such as laches — would apply to the claim of the wards against the guardian, unless the full period of limitation had elapsed after the guardian's denial or repudiation of the trust. *Ibid.*

HIGH SCHOOLS. See SCHOOLS.

HIGHWAYS.

Laying out: User.

1. Sec. 59, ch. 19, R. S. 1858 (providing that the order laying out a highway shall be "competent evidence of the facts therein contained, and shall be *prima facie* evidence of the regularity of all the proceedings prior to the making of such order"), even if it had a retrospective effect, could only apply to such prior highways as were in actual existence when it went into effect. *Williams v. Giblin*, 147

2. Compliance with the requirements of the act of April 15, 1843 (Laws of 1843, p. 46), as to an application in writing by six or more freeholders, and as to written notice of the commencement and route of the proposed highway and of the meeting of the commissioners to make an examination and survey, was essential to the jurisdiction of commissioners to lay out a highway; and where such compliance is not recited in the order or otherwise shown it cannot be presumed by virtue of sec. 59, ch. 19, R. S. 1858. *Ibid.*

3. Travel in the vicinity of the line surveyed for a highway, without any work thereon by the public authorities, would not prevent the extinguishment of the highway, under sec. 80, ch. 16, R. S. 1849, providing that "every public highway already laid out, no part of which shall have been opened and worked within four years . . . shall cease to be considered as a public highway." *Ibid.*

4. The evidence in this case is *held* not to show adverse user of an alleged highway for ten years after sec. 80, ch. 16, R. S. 1849, went into effect. *Ibid.*

5. Ch. 19, Laws of 1857 (providing that all highways laid out and recorded, any portion of which shall have been opened and worked for three years shall be deemed to be legal highways so far as so opened and worked, notwithstanding the statutes may not have been in all respects pursued in laying them out), applied only to highways laid out and recorded by officers having jurisdiction of the subject matter, and was not intended to revive and validate a road which had previously ceased to be a public highway under sec. 80, ch. 16, R. S. 1849. *Ibid.*

Abandonment. See MUNICIPAL CORPORATIONS, 7.

Encroachments, etc. See MUNICIPAL CORPORATIONS, 6. RAILROADS, 4–6.

Injuries from defects, etc. See ACTION, 1. MUNICIPAL CORPORATIONS, 1–5, 8–10.

6. A complaint which, after describing certain alleged defects in a bridge, states that "by reason, entirely, of the insufficiency, want of repair, and defects aforesaid, of and in said bridge," a wagon in which plaintiff was riding was precipitated therefrom, causing serious injuries to her, sufficiently alleges that the defects were the proximate cause of the injury. *Kelly v. Darlington*, 433

Injuries at railway crossings. See RAILROADS, 13–17.

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HUSBAND AND WIFE. See EVIDENCE, 7. INFANTS, 2, 3. MARRIED WOMEN.

ILLEGAL CONTRACTS. See SALE OF CHATTELS, 9, 10. SUNDAY.

IMPEACHMENT of witnesses. See EVIDENCE, 4, 5.

INDEMNITY. See CORPORATIONS.

INFANTS.

1. A note and mortgage having been executed by an infant, her disaffirmance thereof within three and one-half months after she attained majority is *held* to have been within a reasonable time, it not appearing that during said time there was any material change in the relation of the parties to the securities or in the value of the mortgaged land. *Thormaehlen v. Kaeppel*, 378

2. An infant married woman having executed a mortgage of land owned by her to secure a loan of money to her husband, the fact that a part of the money was used to discharge a debt secured by another mortgage theretofore executed by her upon the same land does not render the later mortgage valid to that extent unless the earlier mortgage was valid as against her. *Ibid.*

3. The mere failure of the infant, in such case, to inform the mortgagee that she was an infant or that the earlier mortgage was not valid as against her,—there being no misrepresentation of fact, and no artifice employed to mislead the mortgagee,—was not such a fraud as would preclude her from having the mortgage set aside in a court of equity. *Ibid.*

INJUNCTION. See DEBTOR AND CREDITOR, 4. MUNICIPAL CORPORATIONS, 6, 7.

INSANE PERSON. See JUDGMENT, 5, 6.

INSOLVENCY. See VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See APPEAL, 13. ASSAULT AND BATTERY, 3. CRIMINAL LAW, 2, 3. DAMAGES. LIBEL, 1, 2. MUNICIPAL CORPORATIONS, 10. RAILROADS, 17. SALE OF CHATTELS, 6.

The refusal to give instructions which were substantially embraced in the general charge is not error. *Thompson v. Johnston Bros. Co.* 576

INSURANCE.

Life and accident. See GUARDIAN AND WARD. TRIAL, PLACE OF, 2.

1. A cousin of plaintiff's wife, who lived much of the time in plaintiff's family, procured insurance upon her own life, payable in part to him. Afterwards a question arose as to whether plaintiff, not being a blood relation, could be named as a beneficiary, and it was agreed between the assured, plaintiff, and defendant (an aunt of the assured) that defendant should be named as beneficiary but should receive the insurance moneys in trust and pay a part thereof to plaintiff. Plaintiff thereupon surrendered the insurance certificate, which had been delivered to him, and a new certificate was procured according to the agreement. After the death of the assured the insurance moneys were paid to defendant, but she refused to

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pay any part thereof to plaintiff. *Held*, that whether plaintiff had an insurable interest in the life of the assured or not, defendant was bound to pay over to him the money according to the agreement. *Hurd v. Doty*, 1

2. In an action upon an accident insurance policy, although the medical testimony (somewhat stated in the opinion) was conflicting as to the cause of the death of the assured, a finding by the jury that an injury resulting from a fall was the sole cause of death is *held* to be supported by the evidence. *Hall v. American Masonic Acc. Asso.* 518

3. An affirmative answer to the question, "Was such injury the sole cause of death?" is *held* to be a finding that the injury was the sole and proximate cause of the apoplexy which, it was conceded, was the immediate cause of death; there having been no objection by defendant to the questions submitted, and no request for a specific question as to whether the injury was the cause of the apoplexy. *Ibid.*

4. The jury were instructed that "a grocer delivering goods by occupation," within the meaning of the classification of risks in the policy, is one who habitually delivers, in person, goods sold to his customers, and that an occasional delivery by himself — the rule being that delivery is made by others — would not make him a grocer delivering goods. There was no exception to this instruction. *Held*, that the finding that the assured was not "a grocer delivering goods by occupation" was supported by testimony that, while he occasionally delivered goods, his son delivered the principal part of them. *Ibid.*

5. A statement made by the assured as he lay upon the ground after he fell, or when he was getting up, that "It was a hard one," or "that he got a bad one," was admissible in evidence as of the *res gestæ*. *Ibid.*

6. A statement by the assured, a few hours after his fall, that he was feeling badly, was admissible. *Ibid.*

7. An error in admitting evidence of a statement by the assured, made some time after the accident, that he was badly hurt, was not material, that fact being conclusively proved by other evidence. WINSLOW, J., dissents, being of the opinion that the fact that the injury was serious was not conclusively proven. *Ibid.*

Fire.

8. In an action against an insurance agent for breach of a contract to place insurance on plaintiff's property, the complaint alleged, among other things, that, after a policy had been issued by defendant and the premium therefor been paid to him by plaintiff, the latter moved the insured property and told defendant he wished to have the insurance transferred; that defendant said he would change the policy, but afterwards told plaintiff he had canceled the policy and would issue a new one, that he had placed the insurance, that the unearned premium on the old policy would pay for a new one for the unexpired term, and that he would write the policy and send it to plaintiff. The complaint further alleged that defendant negligently omitted to have the property insured as he had agreed to do; but also alleged that the unearned premium was applied by him in payment of the premium on the policy which he promised to write. It did not allege that the original policy was ever canceled in fact, or that defendant had any unearned premium thereon in his hands, or that he would have been entitled to a

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commission on the new policy had he written it. *Held*, that the complaint was insufficient in that it did not show any consideration for defendant's alleged agreement, and because of the conflicting averment as to the application of the unearned premium. *Stadler v. Trever*, 42

9. Where an insurance policy provides that no action thereon for the recovery of any claim shall be sustained "unless commenced within twelve months next after the *fire*," the time limited begins to run from the date of the fire, and not from the time when the liability is fixed and the right of action accrues. *Hart v. Citizens' Ins. Co.* 77

10. Such a provision is not within the meaning of sec. 1975, R. S., which forbids the insertion in any policy of any provision "that no action or suit shall be brought thereon." *Ibid.*

11. The owner of mortgaged premises was, by a policy, insured against loss or damage by fire to an amount greater than the mortgage debt, "loss, if any, payable to" the mortgagee; and the insurer thereby agreed to make good unto the said assured, his executors, etc., all such loss or damage, not exceeding said amount. *Held*, that the policy was given primarily to insure the owner, and only so much was payable to the mortgagee as her interest might be; that she was not a trustee of an express trust within the meaning of sec. 2607, R. S.; and that in case of loss she could not alone maintain an action on the policy. *Carberry v. German Ins. Co.* 323

12. After an action upon the policy, brought by the assured and the mortgagee, had been pending for nine years, the assured died. His administrator was not appointed until two years after his death, and no application to revive the action was made until a year later, after there had been a trial thereof and a judgment dismissing the complaint. *Held*, that the denial of such application was not an abuse of discretion. *Ibid.*

13. A provision in a policy of insurance against fire that the loss, if any, shall be payable first to a mortgagee or his assigns as his interest may appear, does not operate as an assignment of the policy, whether the mortgage debt be greater or less than amount of the insurance; and in case of a loss an action on the policy must be brought in the name of the insured, though the mortgagee, in respect to his interest, may be joined as a coplaintiff. *Williamson v. Michigan F. & M. Ins. Co.* 393

14. Plaintiff applied to defendant's agent for insurance and truly stated the amount of an incumbrance on his property. At the instance of the agent the defendant's secretary, who was present and who afterwards countersigned the policy, wrote out the application, but falsely stated therein that the incumbrance was for a smaller amount. *Held*, a waiver of a condition in the policy avoiding it in case of any false statement as to incumbrances. *Bourgeois, v. Mut. F. Ins. Co.* 402

15. Under sec. 1977, R. S., an insurance company which has issued a policy upon an application taken by an agent cannot disclaim his agency in the doing of anything necessarily implied in the taking and forwarding of such application. *Ibid.*

16. Where the authority of a local agent is limited to taking applications and receiving premiums, his agency as to a particular policy ceases as soon as the contract is complete, and he has no power thereafter to waive any of the conditions of the policy. *Ibid.*

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17. One who becomes a member of a mutual fire insurance company by accepting a policy therein takes it subject to all the conditions and limitations contained therein and in the charter and by-laws, and in the absence of fraud or mistake is conclusively presumed to know their contents. *Ibid.*

18. All objections to the proofs of loss furnished by the insured are waived by the company keeping them without complaining of any defect or objecting to payment at the time. *Vergeront v. German Ins. Co.* 425

19. An over-estimate by the insured of the value of his property and the amount of the loss, if unintentional and with no purpose of defrauding the company, will not preclude a recovery for the loss. *Ibid.*

20. Ch. 195, Laws of 1891, provides for a "Wisconsin Standard Policy," to which all fire insurance policies issued in this state shall conform, and that other conditions may be written upon or attached to a policy, but that they "shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy." *Held*, that since the enactment of this law a local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive the provision of the standard policy prohibiting future additional insurance. *Bourgeois v. N. W. Nat. Ins. Co.* 606

INTERPLEADER. See RECEIVERS, 1.

INTERSTATE COMMERCE. See SALE OF CHATTELS, 11.

IRRELEVANT MATTER. See PLEADING, 7–9.

JOINDER.
Of causes of action. See PLEADING, 4. TRESPASS.
Of parties. See CORPORATIONS, 4. DEBTOR AND CREDITOR, 4. INSURANCE, 11, 13. PARTNERSHIP, 7. PLEADING, 5, 6, 11.

JUDGMENT.

Offer of judgment: Costs.

1. An offer by defendant to bring into court a certain sum to be paid to plaintiff, unaccompanied by any offer to pay the costs up to that time, is not a sufficient offer of judgment under sec. 3627, R. S., to entitle defendant to costs subsequently accruing. *Warden v. Sweeney,* 161

For deficiency on foreclosure of mortgage. See APPEAL, 2. MARRIED WOMEN.

When to be perfected: Costs. See APPEAL, 14.

Date of foreclosure judgment: When sale may be made. See MORTGAGES, 3.

How pleaded. See PLEADING, 1.

Res adjudicata. See DEBTOR AND CREDITOR, 9.

2. A mere appeal does not affect a judgment as a bar to another action. *Smith v. Schreiner,* 19

3. A judgment, upon demurrer, dismissing a complaint on the ground that it was insufficient by reason of the omission of an essential allegation, is not a bar to another action, the complaint in which contains such allegation. *Taylor v. Matteson,* 113

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Recitals: Findings of fact. See APPEAL, 6. STREET RAILWAYS, 3.

Foreign judgment: Effect: Constitutional law.

4. A claim against the estate of a decedent was disallowed by a probate court in Minnesota, and such disallowance was affirmed on appeal by a district court of that state, on the ground that the claim was barred by the statute of limitations. Such disallowance and affirmance, having in Minnesota the force and effect of a judgment in favor of the estate, are given the same force and effect in this state, pursuant to sec. 1, art. IV, Const. of U. S. *Sanborn v. Perry,* 361

Enforcement by creditors' action: Bastardy. See DEBTOR AND CREDITOR, 2, 3.

Vacating judgment.

5. Judgment by default having been rendered against a garnishee who was insane when the summons was served upon her, it was proper, under sec. 2832, R. S., upon that fact being made to appear, to open the default and allow her to answer. *Bond v. Neuschwander,* 391

6. The property claimed to be in the hands of such garnishee being real estate which, she being insane, could only be transferred by authority of court, plaintiff was not prejudiced by an order vacating the judgment absolutely instead of allowing it to stand as security to him pending the determination of the issue. *Ibid.*

Appeal: From what may be taken. See APPEAL, 1–3.

Reversal on appeal. See APPEAL, 10–13. ASSAULT AND BATTERY, 3. INSURANCE, 7. JUDGMENT, 6. MANDAMUS, 2. MASTER AND SERVANT, 12, 13. PLEADING, 7.

JUDICIAL NOTICE. See DEEDS, 5. PUBLIC LANDS, 1.

JUDICIAL SALES. See MORTGAGES, 3–5.

JURISDICTION. See DRAINS. HIGHWAYS, 2. JUSTICES' COURTS. REMOVAL OF CAUSES. SUPREME COURT. TAXATION, 3.

JURORS: Misconduct. See NEW TRIAL, 4, 5. VERDICT.

JUSTICES' COURTS.

See PROHIBITION. SUPREME COURT.

1. A justice of the peace loses jurisdiction if he fails to enter on his docket the time and place to which a case is adjourned; and in a criminal case the imprisonment of the defendant after such adjournment is unlawful. *Brosde v. Sanderson,* 368

2. If such loss of jurisdiction can be waived in a criminal case by the subsequent appearance of the defendant without objection, such appearance must be a voluntary one. An appearance in order to avoid default on a bond and loss of money deposited to secure his appearance, is not voluntary. *Ibid.*

LACHES. See GUARDIAN AND WARD, 5. INSURANCE, 12. MORTGAGES, 5.

LAND CONTRACT. See DEEDS, 4, 7. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See ADVERSE POSSESSION, 3. CHATTEL MORTGAGES.

1. In a lease of a mill the lessor, a corporation, covenanted to put in a water wheel of not less than fifty horse power "if required by the lessee." *Held,* that it was not necessary that a formal notice should

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be given to the board of directors of the corporation that the wheel was required, but it was enough that a request therefor was made of its officers in charge of the business. *Pewaukee Milling Co. v. Howitt,* 270

2. The lessor having failed to perform the covenant, but having put in a wheel which did not furnish more than thirty horse power, the lessee was not bound, in order to lessen his damages, to put in a new wheel or to reset or alter the one put in so that it would furnish more power. *Poposkey v. Munkwitz,* 68 Wis. 331, distinguished. *Ibid.*

3. The lessee had the right to continue in possession and pay rent and hold the lessor responsible for the damages resulting from its failure to perform the covenant, if he did not acquiesce in or accept the wheel so put in as a performance. *Ibid.*

4. It not appearing that the lessee had a like business already built up which might serve as a basis for the allowance of prospective profits, the measure of damages was the difference between the rental value of the premises with the specified wheel and their rental value with the wheel actually put in. *Ibid.*

5. A lease of chattels provided that in case of a sale of the property by the lessor at any time during the term of the lease he should forfeit to the lessee a certain sum as damages. The lessee was in default in payment of rent, and the lessor sold the property and demanded possession, tendering to the lessee the stipulated sum, which was refused. *Held,* that the lease implied an agreement that the lessor might terminate it at any time by a sale, and that the lessee was not entitled to damages for the taking of the property by the lessor and his vendee. *King v. Ransom,* 496

6. In an action by a landlord against tenants for waste, the defendants may counterclaim for the value of personal property placed by them on the premises during their tenancy, and which the landlord has converted by preventing its removal. *Gilbert v. Loberg,* 661

LANDS SOLD FOR TAXES. See TAX TITLES.

LEASES. See LANDLORD AND TENANT.

LIBEL.

1. In an action by a woman for a libel imputing to her a want of chastity, there was evidence that her general reputation for chastity was bad. *Held,* that unless some equivalent charge was given it was error to refuse to instruct the jury that if plaintiff, "at the time of the publication, was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity is bad cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity." *Nellis v. Cramer,* 337

2. It was not equivalent to such instruction to charge that not only plaintiff's "reputation for chastity must you take into consideration, but also her general reputation," and "in determining the amount of the damages you will consider the nature of the charge made in this article; the injury which is produced upon the feelings of plaintiff. You must consider her character and reputation, her social standing among her friends and acquaintances and the public generally, and her mental suffering on account of this publication." *Ibid.*

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3. An alleged libel was in the form of a petition or complaint to the town board for the purpose of obtaining a revocation of plaintiff's license to sell liquors, and was probably privileged if the only publication thereof was its presentation to said board. The complaint in the action alleged simply that said paper was maliciously written and published. *Held*, that on a demurrer *ore tenus* this should be construed as charging an unauthorized and improper publication or circulation of the paper, and hence that the complaint did not show on its face that the alleged libel was privileged. *Werner v. Ascher*, 349

LICENSEES on track. See RAILROADS, 10-12.

LIENS. See GARNISHMENT, 2.

LIFE INSURANCE. See INSURANCE, 1-7. TRIAL, PLACE OF, 2.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. GUARDIAN AND WARD, 5. INSURANCE, 9. JUDGMENT, 4.

1. A foreign corporation is a person "out of this state," within the meaning of sec. 4231, R. S., which provides that "if, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced" within the time limited, after such person shall return to or remove to this state. *Larson v. Aultman & Taylor Co.* 281
2. Payments by a grantee of mortgaged land who, as part of the consideration, assumed and agreed to pay the mortgage, cannot be imputed to the mortgagor so as to remove the bar of the statute of limitations as against him. *Cottrell v. Shepherd*, 649

LOGS AND TIMBER. See DEEDS, 4. SALE OF CHATTELS, 1-5. TAXATION.

MANDAMUS.

See OFFICERS, 3, 4. SCHOOLS, 1.

1. *Mandamus* will not lie to compel a circuit judge to decide a motion where there has been no refusal to decide and no such delay that a refusal can fairly be inferred. *Baker v. State*, 474
2. An error in overruling an objection to an alternative writ of *mandamus* on the ground that it was signed by the judge instead of the clerk and was not under seal, is *held* not to affect any substantial right and hence not to be one for which the judgment awarding a peremptory writ should be reversed. *State ex rel. Jones v. Oates*, 634

MANDATORY INJUNCTION. See MUNICIPAL CORPORATIONS, 6.

MARRIAGE AND DIVORCE.

The marriage of a person who, for want of age, is incapable of assenting thereto is not void in this state, but under sec. 2350, R. S., is voidable only by judicial decree. *State v. Cone*, 598

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MARRIED WOMEN.

See INFANTS, 2.

Although a married woman joined with her husband in executing a note and mortgage, there should be no judgment against her for any deficiency on foreclosure of the mortgage, unless she signed the note on account of her separate property or to charge the same. *Gaynor v. Blewett*, 399

MASTER AND SERVANT.

Injuries through negligence and defective appliances. See RAILROADS, 12.

1. The presumption is that a boy under the age of fourteen years is not competent to perform duties involving the personal safety of others and requiring the exercise of a good degree of judgment and discretion and constant care and watchfulness; and in an action for injuries resulting from the negligence of a boy so employed, the burden is upon his employer to show that he was in fact competent. *Molaske v. Ohio Coal Co.* 220

2. No usage to employ boys of tender years to perform such duties can be upheld. *Ibid.*

3. In connection with its sawmill defendant had a "slab burner," constructed of sheet iron, in three sections, in all about ninety-five feet high, the lowest section, which was lined with brick, being thirty-five feet high and forty feet in diameter, and the highest section about twenty-one feet high and seventeen feet in diameter. In this burner the slabs and other refuse of the mill had to be disposed of as fast as they accumulated, in order to prevent their overwhelming the works. The only safe way to use the burner was to kindle the fire early in the morning, so that the slabs should be consumed as fast as they were conveyed to it, since, if a large quantity of slabs accumulated in the burner, they would overheat it and open the seams or burst its sides, as had happened once, some years before the day in question. On that day, through a failure to get the fire properly started, there was an accumulation of slabs which nearly filled the lowest section of the burner, and about the time the mill shut down at noon they became fully ignited, and the intense heat caused the burner suddenly to collapse, the highest section falling upon and killing plaintiff's intestate, who was passing. *Held*, that the accident was caused by defendant's negligence in not stopping the mill during the morning so as to allow the burner to clear itself and thus avoid the accumulation of slabs therein. *Faerber v. T. B. Scott Lumber Co.* 226

4. The refusal to allow a witness to testify that the burner was built like other approved burners used in similar mills was not error, since the accident was not caused by any defect in its construction, but by its negligent and improper use. *Ibid.*

5. The negligence of defendant's superintendent who had full charge of the burner and its management on that day was negligence of the defendant. *Ibid.*

6. Remarks of plaintiff's counsel in his argument to the jury, charging defendant with being actuated by motives of parsimony in neglecting to repair or replace the burner after the former injury to it, are *held* not to have been improper. *Ibid.*

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7. An employer is not liable for injuries sustained by an employee in an unsafe or dangerous place in which he was working without any express or implied direction from the employer, even though the same work had been done at other times by other employees in the same place. *Goff v. C. V. & M. R. Co.* 237

8. A special verdict finding that plaintiff, an employee of the defendant corporation, was not, when injured, engaged in the regular course of his duties at the place where directed by defendant's servants charged with the duty of designating the proper place for the performance of such duties; that the place where he was injured was the place where the work he was doing had previously ordinarily been performed, to the knowledge of defendant's agent; that it was the place provided by the defendant for the performance of that work; that it was not reasonably safe for that purpose; and that the proximate cause of plaintiff's injury was a want of ordinary care on the part of the defendant in not providing a reasonably safe place for him to be while doing his work,— is *held* to be inconsistent and not to sustain a judgment for plaintiff. *Ibid.*

9. Where a considerable force of men is engaged in a business necessarily somewhat dangerous — in this case the loading of logs upon cars,— it is the duty of the employer to have some one in attendance to see that the men have reasonably safe places in which to do their work. *Ibid.*

10. The evidence in this case (showing, among other things, that the steel cable by which defendant's freight elevator was raised and lowered, and the drum on which the cable was wound, were near the edge of the elevator platform as it passed up and down and were unguarded, in violation of ch. 549, Laws of 1887; that the check lines by which the elevator was managed were so near to the cable that the person running the elevator might by mistake or inadvertence take hold of the cable instead of such lines, and, if he did so near the drum, would be in danger of having his hand or fingers taken off; and that plaintiff's intestate, a boy sixteen years old, who had been employed four days before to run the elevator, was found dead, jammed between the platform and the ceiling at the side of a hatchway, with his head near the cable, his arms outstretched, and two fingers torn off) is *held* to sustain special findings by the jury to the effect that the elevator was not a reasonably safe appliance, as respected the person employed to operate it; that its unsafe condition was the proximate cause of the intestate's death; that he was not of sufficient age and experience to comprehend the danger, and was not guilty of negligence; that he accidentally seized the cable instead of one of the check lines, before he fell upon the platform, and his hand was thereby drawn into the drum; and that defendant was negligent in permitting or causing the elevator to be used in its dangerous condition. *Thompson v. Johnston Bros. Co.* 576

11. Upon the evidence, it could not be held as a matter of law that the boy assumed the risk of any danger from the proximity of the drum and cable. *Ibid.*

12. It was not a material error to permit an expert to testify that the drum should have been covered, since the statute so required. *Ibid.*

13. A judgment for plaintiff will not be reversed because of a statement by counsel that they could show that another man was caught in the drum, all evidence offered to show such an occurrence having been excluded. *Ibid.*

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Action for wages: Custom to retain part.

14. In an action for a balance due for work as a trimmer in defendant's saw mill, evidence of the terms of defendant's contracts with the other trimmers and of its custom to retain a part of the wages of its employees, to be forfeited by them if they should leave before the end of the sawing season, was not admissible in the absence of evidence that plaintiff had knowledge of the terms of such contracts or the existence of such custom. *Brunnell v. Hudson Saw Mill Co.* 587

Volunteer servants. See STREET RAILWAYS, 5.

MAXIMS.
In jure causa proxima non remota spectatur, 343.
In pari delicto, potior est conditio defendentis, 180.
Nemo debet bis vexari pro una et eadem causa, 24.

MEDICAL TESTIMONY. See ASSAULT AND BATTERY, 2. INSURANCE, 2.

MINORS. See INFANTS.

MISCONDUCT of jurors. See NEW TRIAL, 4, 5. VERDICT.

MISTAKE. See DEEDS, 6, 7. ESTATES OF DECEDENTS, 2.

MODIFICATION of contract. See SALE OF CHATTELS, 1. VENDOR AND PURCHASER, 2.

MORTGAGES.

See APPEAL, 2. CHATTEL MORTGAGES. INFANTS. INSURANCE, 11-13. LIMITATION OF ACTIONS, 2. MARRIED WOMEN. RECEIVERS. TAX TITLES.

1. The positive and uncontradicted testimony of the widow and two sons of the grantor, who were present when the deed was executed, that, though absolute in form, it was given to secure a debt, and that the grantee orally agreed to execute a defeasance, is *held* sufficient to support a finding that the deed was in fact a mortgage, there being nothing against such testimony but the mere suspicion that it might not be true. *McCormick v. Herndon,* 449

2. The deed in such a case may be given the effect of a mortgage without specific performance of such oral agreement being obtained. *Ibid.*

3. Under sec. 3162, R. S., providing that "no sale shall be made until the expiration of one year from the date of" a foreclosure judgment, if the judgment has been signed and filed with the clerk and the costs have been taxed and inserted therein it need not be recorded before the year will begin to run. *Meehan v. Blodgett,* 511

4. Mere inadequacy of consideration is not a sufficient ground for setting aside a foreclosure sale. *Ibid.*

5. Where defendant, with full knowledge of all the facts, waited for more than two years and until the property had materially increased in value before moving to set aside a foreclosure sale, he was guilty of such laches as to deprive him of the right to make the motion on the ground of inadequacy of consideration. *Ibid.*

MUNICIPAL CORPORATIONS.

Public lands in city limits: Pre-emption. See PUBLIC LANDS.

Certiorari: To whom addressed? See CERTIORARI, 1.

Obstruction in street: Nuisance: Injury.

1. The owners of a small steamboat drew it to the edge of a lake for the purpose of launching it, and left it, about 5 o'clock P. M., in

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such a position that it extended about half way across a village street. About 10 o'clock the next morning plaintiff was driving along the street, and led his horse past the boat without injury. The owners were then engaged in launching the boat. About an hour and a half later plaintiff returned, and when he attempted to lead his horse by the boat, which was still in about the same position, the horse, being frightened by it, plunged and finally broke the bit and ran away and was injured. In an action against the village and the owners of the boat, the evidence is *held*, as against such owners, to sustain findings of the jury to the effect that the boat was not launched with reasonable care and promptness, and that, as left in the street, it was an object naturally calculated to frighten horses of ordinary gentleness. *Cairncross v. Pewaukee*, 181

2. The fact that plaintiff, when returning, might have passed around the boat by taking another road about a mile and a half longer, was properly excluded from the consideration of the jury upon the question of contributory negligence; and they were properly instructed that they were not to consider the fact that plaintiff knew of the obstruction when he first passed it, except that such fact held him to a greater degree of care in passing it again. *Ibid.*

3. The jury were also properly instructed not to take into consideration the fact that the bit broke. *Ibid.*

4. A failure to give the notice required by sec. 1339, R. S., to be given to the village, is no defense for the owners of the boat, who were the active agencies in placing the obstruction in the street. *Ibid.*

5. The owners of the boat had the right to place it where they did for the purpose of launching it, and it did not become a public nuisance until it *unnecessarily* impeded or incommoded travel upon the street, that is, until the owners had failed to launch it with reasonable promptness; and the village is not liable, therefore, unless, after the boat had so become a nuisance to the knowledge of its officers, they failed to abate it with reasonable diligence. *Ibid.*

Buildings encroaching on street: Removal.

6. A city may maintain an action in equity against a lot-owner to obtain a mandatory injunction compelling removal of buildings which encroach upon or obstruct a public street. *Eau Claire v. Matzke*, 291

Opening of disused street: Injunction.

7. A temporary injunction granted in an action to restrain a city from opening a street which for more than thirty years it has allowed the plaintiff and its grantors to occupy to the exclusion of the public, will not be disturbed on appeal where it is not shown that, if allowed to stand, it will result in any special harm to the city or any citizen. *Paine Lumber Co. v. Oshkosh*, 397

Injury from slippery sidewalk.

8. Where the notice given pursuant to sec. 1339, R. S., accurately states the place where an injury occurred and describes generally the insufficiency or want of repair which occasioned it, the complaint and evidence need not be confined strictly to the precise defects described or mentioned in the notice. Thus, where the notice stated that at the point where plaintiff slipped and fell on the sidewalk there was a steep and dangerous descent, that the boards were old and rotten, that there were no slats nailed across the walk, and that when wet by rain it became exceedingly slippery, it was

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proper to allow plaintiff to allege and prove the actual condition of the walk, including the facts that it had a lateral pitch and that rains carried slippery mud upon it from the adjoining lot. *Laue v. Madison*, 453

9. Upon the evidence in this case — tending to show that the walk was as above described and that this condition of things had existed for years — it was not error, as against the city, to submit to the jury the questions whether the walk was insufficient and whether the city had constructive notice of that fact. *Ibid.*

10. There was no error prejudicial to the city in instructing the jury that the walk could not be held insufficient because lengthwise it followed the slope of the ground, but that it was for them to determine whether or not it was unsafe because of the extent of its pitch toward the street, and of its being so that earth would wash upon it from the adjacent lot, if they found that earth did so wash upon it. *Ibid.*

NEGLIGENCE. See MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1-5, 9, 10. RAILROADS, 1-17. STREET RAILWAYS, 2.

NEGOTIABLE INSTRUMENTS.

See APPEAL, 12. INFANTS. MARRIED WOMEN. SURETYSHIP, 2.

1. Notes and mortgages obtained, without consideration, from a person weak in mind and fond of liquor, by a designing and shrewd man whom he thought to be his friend, by plying him with liquor, playing on his fears as to the action of supposed creditors, threatening and cajoling him, until, in a state of intoxication and not realizing what he is doing, he signs the instruments, are void, both for lack of consideration and for fraud, in the hands of the payees and subsequent holders who are not *bona fide* purchasers. *Knott v. Tidyman*, 164

2. Notice to an agent for the investment of moneys, of equities in favor of the makers of notes and mortgages in which he makes an investment thereof, is notice to his principal. *Ibid.*

3. One who receives the notes of a third person, a part of which are past due, as collateral security for a pre-existing debt due him from the holder thereof, who had notice of equities in favor of the maker, is not a *bona fide* purchaser. *Ibid.*

NEW TRIAL.

See ATTORNEYS, 5.

1. Where there is evidence which tends to support the verdict, the granting or denying of a motion to set it aside as contrary to the evidence is a matter within the discretion of the trial court, and this court will not interfere unless such discretion has been abused or unless, as a matter of law, upon the entire case the verdict cannot be allowed to stand. *Johnson v. L. S. T. & T. Co.* 64

2. Where no reasons for granting a new trial are stated in the order, it should impose as terms the payment of the taxable costs of the former trial. *Garny v. Katz*, 321

3. Same point. *Cameron v. Mount*, 477

4. Where an order granting a new trial on the ground of misconduct of a juror is based on the minutes of the court and certain affida-

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vits, it will not be disturbed on appeal if such minutes are not before the appellate court, even though the affidavits do not sufficiently establish the alleged misconduct. *Hoffman v. C., M. & St. P. R. Co.* 471

5. Where the successful party is not responsible for the misconduct of a juror, and such misconduct does not of itself render the verdict of the whole jury a perverse verdict, the granting of a new trial because of such misconduct is a matter of discretion, and it should be granted only on the terms that the moving party pay the costs of the former trial. *Ibid.*

NONRESIDENTS. See LIMITATION OF ACTIONS, 1. SERVICE OF SUMMONS. SURETYSHIP, 1.

NONSUIT. See RAILROADS, 18.

NOTICE.
Of appeal. See APPEAL, 4.
In highway proceedings. See HIGHWAYS, 2.
Of injury on street, etc. See MUNICIPAL CORPORATIONS, 4, 8.
Of defect in sidewalk. See MUNICIPAL CORPORATIONS, 9.
Of equities. See NEGOTIABLE INSTRUMENTS, 2.
Of adoption proceedings. See PARENT AND CHILD.
Of termination of option. See VENDOR AND PURCHASER, 6.

NUISANCE. See MUNICIPAL CORPORATIONS, 1–5. RAILROADS, 6.

OFFER of judgment. See JUDGMENT, 1.

OFFICERS.

Election: Possession of office.

1. One who has been declared by the proper canvassing board to have been elected to an office, and has received the proper certificate of election, and has duly qualified, has the *prima facie* right to the office and is entitled to possession thereof, when his term begins, as against every one except a *de facto* officer in possession under color of authority. *State ex rel. Jones v. Oates,* 634

2. An officer who retains possession of the office after his term, claiming that he was in fact re-elected, but without other color of authority, is not a *de facto* officer as against the person who holds the certificate of election and has qualified. *Ibid.*

3. *Mandamus* is the appropriate remedy in such a case to enforce the right of the person having the *prima facie* title to the office. The remedy under secs. 977, 983, R. S., by proceedings to compel delivery of books and papers, is not adequate, where possession of the seal of the office and the moneys appertaining thereto is also desired. *Ibid.*

4. The fact that the person so retaining possession of the office and claiming to have been re-elected did receive the greater number of legal votes at the election cannot be pleaded as a defense in the *mandamus* proceedings as against the relator's *prima facie* title. The contest should be made on *quo warranto.* *Ibid.*

City clerk. See CERTIORARI, 1. COSTS, 1.
Common council. See CERTIORARI, 1.
Corporation officers. See ACTION, 2. CORPORATIONS, 2–4. INSURANCE, 14. LANDLORD AND TENANT, 1.

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De facto officers. See OFFICERS, 1, 2. PROHIBITION.
District attorney. See COUNTIES.
Highway commissioners. See HIGHWAYS, 2, 5.
Quo warranto. See OFFICERS, 4. SUPREME COURT.
School officers. See SCHOOLS.
State treasurer. See EVIDENCE, 1, 2.
Taxing officers. See TAXATION, 8.
Town supervisors. See DRAINS.

OFFICIAL BONDS. See. EVIDENCE, 1, 2.

OPTION to buy land. See VENDOR AND PURCHASER, 1, 5, 6.

ORDER: By court or judge? See PRACTICE.

PARENT AND CHILD.

See GUARDIAN AND WARD, 4.

An order of adoption, based on the abandonment of the child by the parent, is a nullity as against the latter if he had no notice of the proceeding or opportunity to defend. *Schiltz v. Roenitz,* 31

PARTIES. See CHANGE OF VENUE, 3. CORPORATIONS, 4. COUNTIES. DEBTOR AND CREDITOR, 4. INSURANCE, 11-13. PARTNERSHIP, 7. PLEADING, 5, 6, 11. SALE OF CHATTELS, 13.

PARTNERSHIP.

See EJECTMENT.

1. A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit. *Spaulding v. Stubbings,* 255

2. A contract between O. and S. recited that O. was engaged in carrying on a general merchandise business, and that S. had theretofore loaned him a certain sum, which was evidenced by a note. It provided that S. should allow said sum to remain with O. for five years; that O. should pay him interest at ten per cent. (the highest legal rate) on said sum and also one half of the net profits of said business, and should keep correct account books of the business, open at all times to the inspection of S.; and that during said term of five years the stock of goods of said business should not be sold out in bulk without the consent of both parties. S. made further advances for the benefit of the business, and was to some extent active in its management, but it was carried on in the name of O., and in letters to him S. referred to it as "your business." It appeared that S. desired that his connection with the business should be kept secret. *Held,* that O. and S. were partners in the business. *Ibid.*

3. After the death of O. the business was carried on in the name of his administrator, with full knowledge and permission of S., in all respects as before, without any settlement; and S. continued to make advances to carry it on. *Held,* that the liability of S. as a partner continued. *Ibid.*

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4. In an action for the dissolution of a partnership, the defendant cannot plead as a counterclaim any claim against the plaintiff individually, no matter how it arose. So *held*, where the counterclaim alleged was for the amount of defendant's capital in the business, upon a stipulation in the partnership articles that plaintiff would, after a certain time, on notice, pay that amount to defendant for his interest in the business. *Smith v. Diamond*, 359

5. In ejectment by the heirs of a deceased partner against a corporation for an undivided half of partnership lands which had been conveyed to it by the surviving partner, the answer alleged, as a counterclaim, that at the time of the death of plaintiffs' ancestor the indebtedness of the firm was about $21,000, and its assets consisted of the lands in question and other lands, and personal property worth not to exceed $10,000; that in order to pay said indebtedness and carry out the contracts of the firm it was necessary that its business should be continued; that the formation of a corporation, to which the firm property should be conveyed and which should assume said indebtedness and perform said contracts, was necessary for the accomplishment of said purposes and for the interest of plaintiffs, as heirs of the deceased partner, and of his estate, and to prevent a sacrifice of the property; that the defendant corporation was accordingly organized by the surviving partner and the administrator and widow of the deceased, said widow being also guardian of the plaintiffs; that all of the firm property was conveyed to the corporation, and in consideration thereof stock to the amount of over $10,000 was issued to the surviving partner and to plaintiffs' guardian for them, and $500 was paid to said widow; that the corporation has continued the business of the firm, and has applied all of its said property, to the full value thereof, to the payment of said $21,000 indebtedness. The prayer is that the title to the land be adjudged to be in the defendant, and that plaintiffs be adjudged to have no interest therein, etc. *Held*, that the counterclaim failed to show that such disposition of the lands by the surviving partner was a necessary or proper one in order to pay the debts of the firm, and hence failed to show that defendant was entitled to the relief demanded. *Weld v. Johnson Mfg. Co.* 552

6. As the land was personal property in the hands of the surviving partner until the firm debts were paid, and plaintiffs could not, until then, recover possession of it, and as it does not appear that all of such debts have been paid, the answer is good as a defense, though not as a counterclaim. WINSLOW, J., dissents. *Ibid.*

7. Plaintiffs' remedy would seem to be, not by ejectment, but by an action for an accounting by the surviving partner, in which all persons interested should be made parties. Such an accounting could not be had in the ejectment action, because of the absence of necessary parties, and the counterclaim could not be amended so as to bring them in. *Ibid.*

8. Plaintiffs having demurred to the counterclaim, and the facts stated therein being held to constitute a defense, an order striking out the demurrer is affirmed. ORTON, J., and LYON, C. J., dissent. *Ibid.*

PAYMENTS. See LIMITATION OF ACTIONS, 2. TENDER.

PHYSICIANS AND SURGEONS. See ASSAULT AND BATTERY, 2. INSURANCE, 2.

PLACE OF TRIAL. See CHANGE OF VENUE. REMOVAL OF CAUSES. TRIAL, PLACE OF.

PLAT of city. See DEEDS, 5.

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PLEADING.

See CORPORATIONS, 4. DEATH, 1. DEBTOR AND CREDITOR, 5, 6. EJECTMENT. ESTATES OF DECEDENTS, 2. EVIDENCE, 1, 2. HIGHWAYS, 6. INSURANCE, 8. JUDGMENT, 3, 5. LANDLORD AND TENANT, 6. LIBEL, 3. OFFICERS, 4. PARTNERSHIP, 4-8. RAILROADS, 1, 6, 15. STREET RAILWAYS, 5. TRESPASS.

1. Under sec. 2673, R. S. (which provides that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made), an allegation that plaintiff recovered a judgment against defendant and that it was duly docketed, is *held* to be equivalent to a statement that such judgment was "duly given or made." *Pierstoff v Jorges*, 128
2. An allegation that on a day named an execution was, in due form of law, issued upon a certain judgment, to the sheriff, and that said execution was duly returned by said sheriff wholly unsatisfied, sufficiently shows that a *legal* execution had been issued on the judgment and returned unsatisfied. *Ibid.*
3. Where the subject matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity. *Ibid.*
4. New matter added to a complaint by amendment does not make an improper joinder of causes of action where the matter so added does not state a cause of action. *North Hudson M. B. & L. Asso. v. Childs*, 292
5. The original defendants cannot by demurrer to an amended complaint object that there is an excess of parties defendant because of the joinder of new defendants as to whom no cause of action is shown to exist. *Ibid.*
6. In an action for the purchase price of goods, an allegation in the answer that plaintiff is a member of a trust or combination which is the real party in interest, is defective as a plea in abatement where it does not appear whether such trust is a partnership or a corporation and it is not alleged that it or any of its members other than the plaintiff had any interest in the goods sold or the money to be paid for them. *National Distilling Co. v. Cream City Importing Co.* 352
7. Where plaintiff moved to strike out one defense in an answer and to make the other more definite and certain, the failure to determine the second branch of the motion was a material error. *Ibid.*
8. Where a defense is irrelevant and of such a character that it may embarrass or prejudice the plaintiff, it should be stricken from the answer on motion. *Ibid.*
9. A motion to strike out defensive matter is properly denied if any part of the matter so attacked is good. *Gilbert v. Loberg*, 661
10. A general demurrer by one defendant separately should be sustained if the complaint does not state a cause of action as to him. *Cummings v. Town of Lake Realty Co.* 382
11. The question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs states a cause of action against the defendants, cannot be raised by demurrer, under sec. 2649, R. S. *Kucera v. Kucera*, 416

POSSESSION. See ADVERSE POSSESSION.

POWERS in trust. See WILLS, 1.

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PRACTICE.

See APPEAL. ATTACHMENT. ATTORNEYS, 4, 5. CERTIORARI. CHANGE OF VENUE. COSTS. CRIMINAL LAW. DAMAGES. ESTATES OF DECEDENTS, 2. EVIDENCE. INSTRUCTIONS TO JURY. JUDGMENT, 1, 5, 6. JUSTICES' COURTS. MANDAMUS. NEW TRIAL. PLEADING. RECEIVERS. REMOVAL OF CAUSES. SERVICE OF SUMMONS. SUPREME COURT. TRIAL, PLACE OF. VERDICT. WITNESSES.

Upon a rule to show cause before the judge at chambers an order was made, signed by the judge under the formula "By the Court." In a subsequent rule to show cause why that order should not be set aside, it was referred to as an order made by the judge. Upon an appeal from an order denying the latter motion, the first order is treated as one made by the judge at chambers. *Merriman v. McCormick H. M. Co.* 143

PRECATORY TRUST. See WILLS, 1.

PRE-EMPTION. See PUBLIC LANDS.

PREFERENCES. See VOLUNTARY ASSIGNMENT, 1, 5.

PRESUMPTIONS. See ADVERSE POSSESSION, 1. DRAINS, 2. HIGHWAYS, 2. INSURANCE, 17. MASTER AND SERVANT, 1.

PRINTED CASE. See APPEAL, 5.

PRIVILEGED COMMUNICATION. See LIBEL.

PROHIBITION.

1. A writ of prohibition will not issue to test the title of a *de facto* judicial officer. *In re Radl,* 645

2. Where the office of justice of the peace in a city exists *de jure*, a person appointed by the common council to fill a vacancy in such office, and who has qualified, is a *de facto* officer, even though the council had no power to make such appointment. *Ibid.*

PROMISSORY NOTES. See APPEAL, 12. INFANTS. NEGOTIABLE INSTRUMENTS. SURETYSHIP, 2.

PROXIMATE CAUSE. See HIGHWAYS, 6. INSURANCE, 3. MASTER AND SERVANT, 3, 10. RAILROADS, 18. STREET RAILWAYS, 1.

PUBLIC LANDS.

1. Judicial notice will be taken of the fact that lands sought to be acquired under the pre-emption laws of the United States were within the corporate limits of a city, and not subject to pre-emption, under sec. 2258, R. S. of U. S. *Houlton v. C., St. P., M. & O. R. Co.* 59

2. The act of Congress of March 3, 1877, providing that "the existence or incorporation of any town on the public lands of the United States shall not be held to exclude from pre-emption . . . a greater quantity than 2,560 acres of land," does not apply to a city laid out mostly on private lands but including some of the lands of the United States. *Ibid.*

PUBLIC SCHOOLS. See SCHOOLS.

PUBLICATION. See LIBEL, 3. SERVICE OF SUMMONS.

QUO WARRANTO. See OFFICERS, 4. SUPREME COURT.

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RAILROADS.

Condemnation of land.

1. In a proceeding by a railway company, under sec. 1852, R. S., to condemn land on which a spur track has been constructed and has been in use for two years, the petition need not allege that "it is the intention of the corporation, in good faith," to use the land for the purpose of operating its road, as is required by sec. 1846, in a case where the track has not been constructed. *Chicago, M. & St. P. R. Co. v. Richardson,* 154

2. Where the land sought to be taken is a strip but eighteen feet wide, and the track runs through the center of such strip and has been in use more than two years, these facts show *prima facie* the necessity of taking the lands. [Whether it is incumbent on the company to show the necessity in the first instance, not determined.] *Ibid.*

3. Where the owners of land assented to and acquiesced in the laying of a spur track thereon, the right to condemn the land therefor is perfect without proving a necessity for the taking; and they will not be heard to deny such right on the ground that the land taken is a part of a manufacturing plant or a water power. *Ibid.*

Obstruction of streets.

4. An instrument granting to a railroad company the right to construct, maintain, and operate its railroad in the street in front of the grantor's lot, "as the same was at the date of said instrument constructed," gave the company no right thereafter to destroy the street as a public highway in front of said lot. *Evans v. C., St. P., M. & O. R. Co.* 597

5. The construction and maintenance of a railroad along a street in such a way as to destroy entirely the use of the same as a public highway, is not authorized by statute (R. S. sec. 1828, subd. 5, and sec. 1836). *Ibid.*

6. A complaint alleging that a railroad company has wrongfully and unlawfully used and occupied the street opposite plaintiff's lot in such a way as to completely obstruct all travel with teams thereon and to entirely destroy its use as a public highway, and has thereby prevented plaintiff's former customers, and other persons who would otherwise have done business with him at his warehouse and elevator on said lot, from having access to or egress from the same, and has thereby destroyed plaintiff's business and the value of his said premises, shows that plaintiff has suffered such special and peculiar damage as to enable him to maintain an action therefor, both at common law and under sec. 3180, R. S. *Ibid.*

Fences: Killing of horses on track.

7. To the plaintiff's knowledge, four or five rods of the fence between his yard and defendant's track had been broken down for several months, and the opening had been used as an entrance to the yard. His horses were turned loose in the yard by an employee who had been instructed to watch them to see that they did not get upon the track. The yard was about eighty feet wide, with good pasturage extending through the opening in the fence and upon defendant's right of way. While the employee's attention was diverted by other work the horses passed through the opening upon the track, and they were shortly afterwards killed by a passing train. *Held,* that plaintiff was guilty of contributory negligence. *Peterson v. N. P. R. Co.* 206

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Carriers: Injury to passenger.

8. In an action against a railway company for personal injuries sustained by plaintiff while leaving a train, where her evidence tended to show that she left her seat, with her baby in her arms, when the train stopped, and proceeded with reasonable diligence to the front platform, and that while in the act of alighting with her husband's assistance the train started and threw her to the ground, it was error to direct a verdict for defendant, although the evidence on its behalf tended to show that she did not start to leave the train until it was again in motion, and in fact jumped from the train while it was moving. *Alford v. C., M. & St. P. R. Co.* 235

Carriers: Delay in unloading horses.

9. Where a railroad company, through its freight agent, contracted to carry horses to a point a few miles distant and to unload them the same evening, it is liable for damages resulting from its failure so to unload them, although the conductor of the train on which they were shipped told the shipper, a few minutes before the train started, that he did not think they could be unloaded that night. *Corbett v. C., St. P., M. & O. R. Co.* 82

Injury to licensee on track.

10. A railroad company which has licensed the use of its grounds and track by pedestrians for a way, is bound to provide for a careful lookout in the direction in which a train is moving, in places where people are liable or likely to be on the track, and to signal the approach of its cars to persons in positions of danger. *Johnson v. L. S. T. & T. Co.* 64

11. Whether the plaintiff in this case, who, as a licensee, was walking between the rails of defendant's track and was struck by a locomotive running backward in the same direction, was guilty of contributory negligence in not looking back oftener than he did, is *held*, upon the evidence, to have been a question for the jury. *Ibid.*

Injury to employee on track.

12. While plaintiff, a fireman, was walking through defendant's switch yard to the roundhouse to take out his engine, he was struck and injured by cars which had been "kicked" by a switch engine upon the track on which he was walking. He was familiar with the yard, and knew that switching was actively in progress on the tracks behind him, but although there were spaces between the tracks where he could have walked with safety, and although his ears were covered by his cap, he had walked on or immediately beside the main track for about 180 feet without looking around. *Held*, that he was guilty of contributory negligence. *Wilber v. Wis. Cent. Co.* 535

Injuries to travelers on highways.

13. While driving along a highway towards defendant's track plaintiff crossed a bridge which had proper side protections. When 53 feet from the end of the bridge and 175 feet from the track he saw a train 55 rods distant approaching at high speed. He walked his horse to the end of the bridge, in compliance with a notice thereon, and then drove as fast as he could to the track, on which his buggy was struck by the train and he was injured. He might, before reaching the track, have turned into a side road which ran nearly parallel with the track. His horse was unused to the cars and easily frightened. *Held*, that he was guilty of negligence in deliberately attempting to cross the track in front of the train. The

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rule that accuracy of judgment is not required in the choice of the very best means of escaping imminent peril, has no application. *Dullea v. C. & N. W. R. Co.* 173

14. It is the duty of a traveler on a highway crossed by a railroad track, if he approaches the crossing when a moving train in close proximity thereto is also approaching it, to wait for the train before he crosses the track, and his failure to do so is negligence. *Brunette v. C. & N. W. R. Co.* 197

15. The complaint in this case is construed as alleging, in substance, that the crossing of defendant's railway tracks and a certain highway was a dangerous one; that defendant had for some time, to the knowledge of plaintiff, maintained guard gates at the place; that, relying on the fact that there were such gates and that they were always lowered on the approach of trains, plaintiff, because the gates were not lowered, approached the crossing, and was about to pass over it, when a train passed and caused his horse to run away and thus inflicted the injuries complained of. So construed, the complaint is *held* to charge actionable negligence on the part of defendant. *Rohde v. C. & N. W. R. Co.* 309

16. The statutory regulations as to the rate of speed of trains and the giving of signals at or near highway crossings apply only to grade crossings. *Jenson v. C., St. P., M. & O. R. Co.* 589

17. In an action for injuries sustained by reason of a horse being frightened by a train which was running about fifteen miles an hour over a crossing above a highway, it was error to charge the jury that they should take into consideration the rate of speed of the train, and that it was negligence not to have rung the bell or blown the whistle. *Ibid.*

Fires set by locomotive.

18. In an action for injury to a cranberry marsh by fire, a nonsuit was properly granted upon evidence which left it a matter of conjecture whether the injury was caused by the original fire started by defendant twelve miles distant or by back-fires started to prevent its spread. *Megow v. C., M. & St. P. R. Co.* 466

Garnishment: Liens of laborers. See GARNISHMENT, 2.

Street railways. See STREET RAILWAYS.

RATIFICATION. See CORPORATIONS, 3.

REAL ESTATE AGENTS. See VENDOR AND PURCHASER, 5.

REAL PROPERTY. See ADVERSE POSSESSION. DEEDS. EJECTMENT. JUDGMENT, 6. LANDLORD AND TENANT. MORTGAGES. PARTNERSHIP, 5–8. PUBLIC LANDS. RAILROADS, 1–4. TAX TITLES. TRESPASS. VENDOR AND PURCHASER.

RECEIVERS.

See VOLUNTARY ASSIGNMENT, 5.

1. Plaintiff had purchased land from defendant G. and given back a mortgage securing notes for a part of the purchase price. Defendant B. claimed to own said notes and mortgage, and had got possession thereof and pledged them to defendant C. Defendant G., the payee, also claimed them. Plaintiff, in his complaint, offered to perform all the conditions of the notes and mortgage, and asked for the appointment of a receiver thereof, with power to receive payments, and that defendants interplead for the determination of

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their rights. The complaint also alleged false representations as to the land by G., and asked damages therefor and that the notes and mortgage be canceled down accordingly. The receiver was appointed as prayed. Afterwards, plaintiff having failed to make payments as they became due, an order was made directing the receiver to foreclose the mortgage unless plaintiff should pay the amount due within twenty days. On appeal by plaintiff and defendant G., such order is *held* not an abuse of discretion. *Neeves v. Boos*, 313

2. The regularity of the appointment of the receiver could not be questioned on the appeal from the order directing him to foreclose the mortgage. *Ibid.*

RECITALS.
In judgment. See APPEAL, 6. STREET RAILWAYS, 3.
In writ of attachment. See ATTACHMENT, 1.

RELATION, Doctrine of. See DEEDS, 4.

REMOVAL OF CAUSES.

1. The decision of a circuit court of the United States that the federal statutes have been complied with for the removal of a cause to that court, is conclusive, and the state court has thereafter no right to decide otherwise and retain jurisdiction of the cause. *Northern Pacific R. Co. v. McMullen*, 501

2. A party does not waive the right to a removal by answering and defending on the merits in the state court after that court has wrongly refused to order a removal. *First Nat. Bank v. Conway*, 67 Wis. 210, distinguished. *Ibid.*

RE-OPENING CASE. See EVIDENCE, 10.

REPLEVIN. See DEEDS, 4.

REPUTATION. See LIBEL.

RES ADJUDICATA. See JUDGMENT, 2, 3. REMOVAL OF CAUSES, 1.

RESCISSION. See VENDOR AND PURCHASER, 3, 4.

RES GESTÆ. See INSURANCE, 5, 6.

RESTRAINT OF TRADE. See SALE OF CHATTELS, 9. 10.

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REVERSAL OF JUDGMENT. See JUDGMENT, *Reversal*.

REVIVAL of action. See INSURANCE, 12.

ROADS AND STREETS. See ACTION, 1. HIGHWAYS. MUNICIPAL CORPORATIONS. RAILROADS, 4–6, 13–17.

RULES OF COURT. See APPEAL, 5. DEBTOR AND CREDITOR, 5, 6.
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Circuit Court Rule XXIV (Exceptions), 467, 470.
" " " XXVIII, sec. 1 (Creditors' actions), 370, 374.

SALE OF CHATTELS.

See LANDLORD AND TENANT, 5. SUNDAY.

1. Purchasers of cedar posts are *held* to have been bound by a modification of the original contract of purchase, made on their behalf by an agent having general authority to purchase posts for them, it appearing that such modification was necessary in order to ob-

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tain more than a small quantity of posts, and that the report of the purchasers' inspector, accepted and acted upon by them, was entirely inconsistent with the theory that the original, and not the modified, contract was in force. *Spaulding Lumber Co. v. Stout*, 89

2. A contract for the sale of certain lumber provided that the amount thereof should be estimated by two persons, one chosen by each party, and said two to choose a third in case of disagreement, and that their estimate should be conclusive. *Held*, that the estimate so made stood upon the same ground as an award of arbitrators, and should not be disturbed except for fraud or a mistake, as distinguished from mere misjudgment, affecting in a considerable degree the substantial rights of the party complaining of it. *Stubbings v. McGeegor*, 248

3. Such estimators having, without authority, regraded the lumber and omitted from their estimate a portion thereof which was included in the sale, their partial estimate is wholly inoperative. *Ibid.*

4. The objection that the evidence of the estimators, or their subsequent statements, could not be received to impeach their estimate, could not be made for the first time on appeal to this court. *Ibid.*

5. The lumber having been shipped away by the purchasers, after such partial estimate, so that a new estimate could not be made, the court in a proper case might hear proofs as to the quantity of the lumber and decree accordingly. *Ibid.*

6. In an action for damages by reason of defects in machinery purchased, the evidence being conflicting as to whether the defects were patent, it was error to charge the jury that plaintiff, having purchased the machinery with full opportunity for inspection, could not recover on account of the defects. *Larson v. Aultman & Taylor Co.* 281

7. Where it is shown to be the general custom for local agents selling mill machinery to warrant the same, the purchaser may recover from the principal for a breach of a warranty by the agent. *Ibid.*

8. Where the capacity of machinery was unknown to the vendee and he bought it relying upon the warranty of the vendor, he may recover for a breach of the warranty, although he kept and used the machinery for some time after discovering its defective character or want of capacity, before notifying the vendor thereof or offering to return the machinery. *Ibid.*

9. The mere fact that the vendor of goods was a member of an unlawful trust or combination formed for the purpose of acquiring complete control and a monopoly of the trade in goods of that class, is no defense to an action against the vendee for the purchase price, the illegality being entirely collateral to the sale *National Distilling Co. v. Cream City Importing Co.* 352

10. An agreement by which the vendee was to receive a rebate of the purchase price if, for a certain period, he made all his purchases of goods of that class from the trust or members thereof, did not render the sale invalid. *Ibid.*

11. Where both vendor and vendee were corporations of the state in which the sale was made, it was not a transaction of interstate commerce, within the act of Congress of July 2, 1890. *Ibid.*

12. Where the vendee of a harvesting machine had the right to return it, either because of defects constituting a breach of warranty or under a condition of the sale that he might return it if dissatisfied, but, after testing it and discovering the defects or determining that

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he was not satisfied and would return it, he continued to use it, not to make a further test but merely for the purpose of completing his harvest, such use was an acceptance of the machine and the right to return it was thereby lost. *Palmer v. Banfield,* 441

13. Plaintiff was the agent of manufacturers under a contract providing that if he made sales of their machines on terms other than those specified he should be charged as purchaser thereof. He sold a machine to defendant on other terms, was charged as purchaser, and paid the manufacturers therefor. *Held,* that he thereby became the owner of the cause of action against defendant for the price of the machine. *Ibid.*

SALE OF LANDS. See ADVERSE POSSESSION, 2, 3. DEEDS. PUBLIC LANDS. TAX TITLES. VENDOR AND PURCHASER.

SCHOOLS.

1. The board of a free high school district may institute a proceeding by *mandamus* to compel the levy and collection of a tax for the support of the school. *State ex rel. Free High School Board v. Lamont,* 563

2. If the amount to be raised by a town in a joint free high school district is legally apportioned to it, the town clerk must include such amount in the tax roll, notwithstanding any direction to the contrary by the town board or by the electors at a town meeting. *Ibid.*

3. The refusal of any number of towns, less than the whole number, in such district to levy and collect taxes for their respective shares of the expenses of the school, cannot disorganize or dissolve the district or relieve any town clerk of his duty to insert the proper sum in the tax roll. *Ibid.*

4. The fact that the school-house is in a city is of no significance if the city is a part of the district. *Ibid.*

5. The apportionment of the amount to be raised for the support of the school is not invalidated as to any town in the district by the fact that it was made on the basis that a town not in fact a part of the district was embraced therein. *Ibid.*

6. The fact that the board, when making the apportionment, did not have before it certificates of the clerks of the several towns stating the equalized valuation of taxable property therein, is immaterial. *Ibid.*

SCIENTER. See FALSE REPRESENTATIONS, 2.

SEISIN. See ADVERSE POSSESSION.

SERVICE OF SUMMONS.

Under sec. 2640, R. S., when the plaintiff avails himself of the option given by an order for service by publication to deliver a copy of the summons and complaint to the defendant personally without the state, such delivery has "the same effect as a completed publication and mailing," and the defendant has but twenty days thereafter in which to plead. *Wilmot v. Smith,* 299

SIDEWALKS. See MUNICIPAL CORPORATIONS, 8–10.

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STOCK AND STOCKHOLDERS. See CORPORATIONS.

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STREET RAILWAYS.

1. A street car, while crossing a street on which a funeral procession was moving, stopped suddenly in the middle of the street in front of the first carriage, thereby causing it to stop so suddenly that the pole of the second carriage, which was following close behind, broke into its back. *Held*, that the stopping of the street car was the proximate cause of the injury. *Mueller v. Mil. St. R. Co.* 340

2. The fact that the street car was stopped in the middle of the street in violation of a penal ordinance, was sufficient proof of negligence on the part of the street railway company. *Ibid.*

3. It was found by a special verdict that plaintiff, with other boys, got upon the front platform of an electric car by invitation of the motorman; that the conductor did not warn them off until after the car was in motion, and that he then used some force, either with hand or foot, whereby plaintiff was caused to fall from the car; that the wheels of the car crushed plaintiff's arm; that plaintiff was about eleven years old and, under all the circumstances, was not guilty of negligence proximately contributing to the injury; and that he sustained damage to a certain amount. The complaint had alleged that when plaintiff fell from the car it was going at a high rate of speed; and it was recited and found by the court, in the order for judgment and in the judgment, that all the allegations of fact in the complaint, beyond those covered by the special verdict, had been proved to be true by the undisputed evidence. *Held*, that the facts so found by the court will be treated as verities, in the absence of a bill of exceptions containing the evidence, and that the verdict, supplemented by such finding, is sufficient. *Hart v. West Side R. Co.* 483

4. If plaintiff is to be regarded as a passenger on the car, his forcible ejection therefrom, under the circumstances found, rendered the defendant liable. *Ibid.*

5. The complaint alleged that the car was in charge of a motorman on the front platform and a conductor; that it was a custom of the motormen on defendant's cars to permit boys of plaintiff's age to ride on the front platforms to a certain switch, "for the purpose of inducing such boys to turn said switch for said employees;" that on the occasion in question the plaintiff, with the permission of the motorman "and in pursuance of the custom" mentioned got upon the front platform of the car for the purpose of riding to said switch. *Held*, that these allegations did not show any purpose of plaintiff to aid in operating defendant's railway such as would make him a volunteer fellow-servant of the conductor. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS. RAILROADS, 4–6.

SUMMONS. See SERVICE OF SUMMONS.

SUNDAY.

One who sells and delivers property on Sunday cannot afterwards maintain an action for its conversion by the purchaser, on the ground that the contract was illegal. *Cohn v. Heimbauch*, 176

SUPPLEMENTARY PROCEEDINGS. See DEBTOR AND CREDITOR.

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SUPREME COURT.

See APPEAL.

This court declines to take original jurisdiction of a proceeding in the nature of *quo warranto* to try the title to office of a justice of the peace in the city of Portage, the question presented not being one which affects the state at large. *State ex rel. Radl v. Shaughnessey,* 646

SURETYSHIP.

See EVIDENCE, 1, 2.

1. Under our statute (R. S. sec. 2600) abolishing the distinction between actions at law and suits in equity, a surety who has paid the whole debt may recover in an action at law against his cosureties who are solvent and reside in this state the same contribution as if they were all of the sureties bound. *Faurot v. Gates,* 569

2. In an action by one guarantor of a note against another for contribution, the defendant cannot prove a want of consideration paid to the principal for a prior note which the note paid by plaintiff was given to renew. *Ibid.*

SURVIVAL of actions. See ACTION, 1.

TAXATION.

See COSTS, 1. SCHOOLS. VOLUNTARY ASSIGNMENT, 6, 7.

1. Under sec. 2, ch. 473, Laws of 1891, all sawlogs cut within six months prior to April 1st were to be assessed in the assessment district in which they were banked or piled, except logs which were to be sawed or manufactured in a mill in this state owned by the owner of such logs; and such logs could be brought within the operation of the exception only by a strict compliance with the proviso following the exception in said section. *State ex rel. Holt L. Co. v. Bellew,* 189

2. Said act, so construed, was not in violation of sec. 1, art. VIII, Const., which provides that "the rule of taxation shall be uniform;" nor was it invalid because under it the owner might determine in what district his property should be taxed. *Ibid.*

3. The fact that the owner of logs banked in one district listed them for taxation in another district in which his mill was located, did not give the taxing officers of the latter district jurisdiction over such logs if the affidavit and statement required by the proviso in said section were not filed with the assessor of the district in which the logs were banked; nor was the owner estopped thereby to assert the invalidity of the assessment of the logs in the district where they were so listed. *Ibid.*

TAXATION of costs. See APPEAL, 14. COSTS, 2.

TAX TITLES.

See DEEDS, 5.

1. One with whose means land was purchased, and who agreed, as part of the consideration, to pay existing mortgages thereon, and who continued to be the real owner and, through tenants, to be in pos-

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session of the land, although for purposes of his own the apparent legal title was at times in different other persons, was, as between himself and the grantor, who besides holding a mortgage for a part of the purchase price had become the owner of the prior mortgages mentioned, bound to pay the taxes on the land and could not, as against said mortgages, acquire a valid tax title founded on a sale for such taxes. *Perkins v. Wilkinson*, 538

2. A tax deed so obtained by such real owner for the purpose of cutting off said mortgages is *held* in this case to have been the result of a deliberate fraud: and one to whom he conveyed the land, and who had knowledge of the mortgages and of the relations of his grantor to the premises, and who gave nothing for such conveyance except a release of stale claims against his grantor and his son-in-law (his grantor's son), is *held* not to have been a *bona fide* purchaser. *Ibid.*

TENDER.

An alleged tender in this case is *held* to have been insufficient, the amount offered being less than was admitted to be due, and there having been no notice as to where the money or its equivalent might be found if the other party should conclude to accept it, and the tender not having been kept good. *Warden v. Sweeney*, 161

TERMS. See NEW TRIAL, 2, 3, 5.

TOWNS. See COUNTIES. DRAINS. SCHOOLS.

TRAMPS. See CRIMINAL LAW, 3.

TRESPASS.

See ADVERSE POSSESSION, 1. DEEDS, 4.

A complaint alleging that defendants broke and entered plaintiffs' close and entered their shops, etc., and took and carried away and converted to their own use certain described chattels, the property of plaintiffs, whereby plaintiffs suffered great damage in the loss of said property and in the interruption to their business carried on in said shops, etc., and were injured in their business standing and credit, and were damaged in all of the foregoing in the sum of $2,000,—is *held* to state but one cause of action, for a trespass *quare clausum fregit*, and to be sufficiently definite and certain. *Merriman v. McCormick H. M. Co.* 142

TRIAL. See ATTORNEYS, 4, 5.

TRIAL, PLACE OF.

See CHANGE OF VENUE. REMOVAL OF CAUSES.

1. The words "cause of action," as used in subd. 5, sec. 2619, R. S., include the act or omission without which there would be no cause of action or right of recovery. *Hosley v. Wisconsin Odd Fellows' M. L. Ins. Co.* 463

2. Where, by the terms of a policy and the by-laws of the company, payment of life insurance moneys is to be made by a check delivered to the beneficiaries, a default, if any, in such payment takes place in the county in which the beneficiaries have continuously resided; and under subd. 5, sec. 2619, R. S., an action on the policy is triable in that county. *Ibid.*

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"TRUST" COMBINATIONS. See SALE OF CHATTELS, 9–11.

TRUSTS AND TRUSTEES. See ACTION, 2. GUARDIAN AND WARD. INSURANCE, 1. WILLS, 1.

UNDUE INFLUENCE. See WILLS, 2.

USAGE. See MASTER AND SERVANT, 2, 14. SALE OF CHATTELS, 7.

USER. See HIGHWAYS, 4.

VACATING JUDGMENT. See JUDGMENT, 5. 6.

VENDOR AND PURCHASER OF LAND.

See ADVERSE POSSESSION, 2, 3. DEEDS, 1–4, 6–8. LIMITATION OF ACTIONS, 2. TAX TITLES.

1. Where one having a written option for the purchase of land elects to purchase within the time prescribed, and enters upon the land and expends money thereon, he may enforce performance of the contract. *Wall v. M., St. P. & S. S. M. R. Co.* 48

2. Although an oral modification of such contract is within the statute of frauds, yet where the purchaser, relying thereon, has expended large sums in improvements, the courts may compel specific performance of the contract as modified. *Ibid.*

3. A mere reference by a vendor to the property as "my land," in general conversations with the vendee, not shown to have had any reference to the proposed purchase, is not such a fraudulent representation of good title as will support an action to rescind the sale upon failure of title, even though the vendee may testify that he relied thereon. *Reuter v. Lawe,* 106

4. Where a contract for the sale of land has been executed by delivery of the deed and payment of the purchase-money, and there is nothing to prevent the purchaser from taking possession, there can be no rescission, in the absence of fraud, even though the title fails. The remedy is on the covenants of the deed. *Ibid.*

5. The owner of land gave to one J. the exclusive option of buying or selling it on or before a certain date at a certain price. J. gave to C. an option to buy the land on or before said date at a higher price, and agreed to pay him $1,000 if he did so. C. paid J. for said last-mentioned option, and also performed services for J. in procuring purchasers for the land, but the negotiations for the purchase were not completed on the date to which the options were limited, and the land was afterwards sold by the owner directly to said purchasers. *Held,* that C. had no cause of action against the owner of the land, either for the amount which he paid to J. for the option or for his services in procuring the purchasers. *Cummings v. Town of Lake Realty Co.* 382

6. Rights under an option to buy or sell land on or before a certain date expire on that date without notice or declaration of forfeiture; and a mere prolongation of the negotiations for a sale until the evening of the last day does not warrant the holder of the option in believing that no forfeiture will be insisted upon. *Ibid.*

VENUE. See CHANGE OF VENUE. TRIAL, PLACE OF.

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VERDICT.

See INSURANCE, 3. MASTER AND SERVANT, 8, 10. NEW TRIAL. STREET RAILWAYS, 3.

A jury having retired with leave, if they agreed upon a verdict, to seal it and separate, sealed a pretended verdict to the effect that they agreed to disagree, and separated. *Held*, that this was a wilful violation of duty, involving falsehood and fraud, and was of such a character as to impeach the motives of the jurors and the integrity of a verdict in favor of one of the parties returned by them after they had reassembled on the next day and the cause had been resubmitted to them; and a judgment based on the latter verdict cannot be upheld. *Sawvel v. Bitterlee*, 420

VOLUNTARY APPEARANCE. See JUSTICES' COURTS, 2.

VOLUNTARY ASSIGNMENT.

1. An insolvent firm gave bills of sale, etc., covering the bulk of its property, to officers of banks to which it was indebted, taking back an instrument stating that such bills of sale, etc., were given as collateral securities for the payment of notes made or indorsed by the firm and held by said banks. The manifest purpose of the transaction being that said bank officers should sell the property and apply the proceeds on the several claims so held by the banks, respectively, *pro rata*, it is *held* to have been a voluntary assignment for the benefit of creditors, within the meaning of sec. 1694, R. S., and void because not executed as therein prescribed and because it gave an unlawful preference. *Northern Nat. Bank v. Weed*, 212

2. Prior to the enactment of ch. 276, Laws of 1893, if the court commissioner taking the bond of an assignee for the benefit of creditors failed to indorse on it his approval thereof, the assignment was void. And where an assignment had been adjudged void for that reason, such judgment was not affected by the subsequent passage of said act, although it provides that "all bonds heretofore taken and filed . . . by said court commissioner are hereby declared to be sufficiently approved and valid." *Charles Baumbach Co. v. Singer*, 329

3. An insolvent debtor had received in trust moneys of a lodge of which he was a member, and had mingled them with his own moneys, but had afterwards loaned the amount thereof to a fellow-member as and for the moneys of the lodge. They were repaid to him after he had made an assignment for the benefit of his creditors, and were immediately returned by him to the lodge. *Held*, that the claim for the moneys so loaned was properly omitted from the schedule of his assets on the assignment, and hence that such omission was not a valid objection to his discharge from his debts. *Van Ingen v. Feldt*, 345

4. A banking corporation, created and existing under the general banking law of this state, may make a valid assignment of all its property for the benefit of its creditors. *Garden City B. & T. Co. v. Geilfuss*, 512

5. Where a banking corporation has made a valid assignment of all its property for the benefit of creditors, such property cannot be sequestered and a receiver thereof appointed, under secs. 3216, 3217, S. & B. Ann. Stats., so as to supersede the assignment and change the rule for the distribution of the proceeds of the property among creditors. *Ibid.*

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6. Taxes assessed to an assignee for the benefit of creditors on account of personal property in his hands as such assignee are entitled to the preference of payment provided by sec. 1693c, S. & B. Ann. Stats.; and under sec. 1700 it is the duty of his successor in the trust to pay them before making any dividend, unless for any reason such taxes are illegal. *Marathon Co. v. Barnes*, 663

7. An action by a county against an assignee for the benefit of creditors to recover delinquent taxes on personal property and to have them adjudged a preferred claim and to have the assignee ordered to pay them, is essentially an equitable action and cannot be maintained because the relief may be obtained in the assignment proceedings. *Ibid.*

VOLUNTEER servant: Injury to. See STREET RAILWAYS, 5.

WAIVER.
Of right to change of venue. See CHANGE OF VENUE, 6.
Of conditions in policy. See INSURANCE, 14-16, 20.
Of objections to proofs of loss. See INSURANCE, 18.
Of loss of jurisdiction. See JUSTICES' COURTS, 2.
Of right to removal. See REMOVAL OF CAUSES, 2.
Of objection to evidence. See SALE OF CHATTELS, 4.
Of defects. See SALE OF CHATTELS, 8, 12.

WARRANTY. See FALSE REPRESENTATIONS, 2. SALE OF CHATTELS, 7, 8, 12.

WASTE. See LANDLORD AND TENANT, 6.

WILLS.

1. A will gave a fund to a trustee, directing that the interest and income arising therefrom should be paid over to the daughter of the testatrix, and authorizing said trustee to pay over to her "any portion of the principal of said trust fund, as it shall seem to him proper, for her support and comfort." *Held*, that the trust power in respect to payment of the principal was imperative and, upon the death of the original trustee, might be executed by a trustee appointed by the court. *Osborne v. Gordon*, 92

2. Findings sustaining a will against objections on the ground of mental incapacity and undue influence, are *held* to be supported by the evidence. *Hoffman v. Joachim*, 188

WITNESSES.

See CHANGE OF VENUE. EVIDENCE, 4, 5, 7.

Attendance as a witness in an action pending in another state is a sufficient consideration for a promise to pay the witness more than the legal fees, since such attendance could not have been compelled. *Armstrong v. Prentice*, 210

WORDS AND PHRASES.
Cause of action, in statute. See TRIAL, PLACE OF.
Completed publication, etc., in statute. See SERVICE OF SUMMONS.
Crossing of highway, in statute. See RAILROADS, 16.
Date of foreclosure judgment, in statute. See MORTGAGES, 3.
Finding of a court, in statute. See APPEAL, 14.
Twelve months next after the *fire*, in policy. See INSURANCE, 9.
Grocer delivering goods by occupation, in policy. See INSURANCE, 4.

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Out of this state, in statute. See LIMITATION OF ACTIONS, 1.
Parties aforesaid, in affidavit. See ATTACHMENT, 2.
Partnership. See PARTNERSHIP, 1.
Required by the lessee, in lease. See LANDLORD AND TENANT, 1.
For the *sole use* of, in policy. See GUARDIAN AND WARD, 1.
Special injury, in statute. See RAILROADS, 6.
Trustee of an express trust, in statute. See INSURANCE, 11.
Voluntary appearance. See JUSTICES' COURTS, 2.

WRIT.
Of attachment. See ATTACHMENT, 1.
Of *certiorari*. See CERTIORARI. COSTS, 1.
Of execution. See PLEADING, 2.
Of *mandamus*. See MANDAMUS. OFFICERS, 3, 4. SCHOOLS, 1.
Of prohibition. See PROHIBITION.
Of *quo warranto*. See OFFICERS, 4. SUPREME COURT.

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